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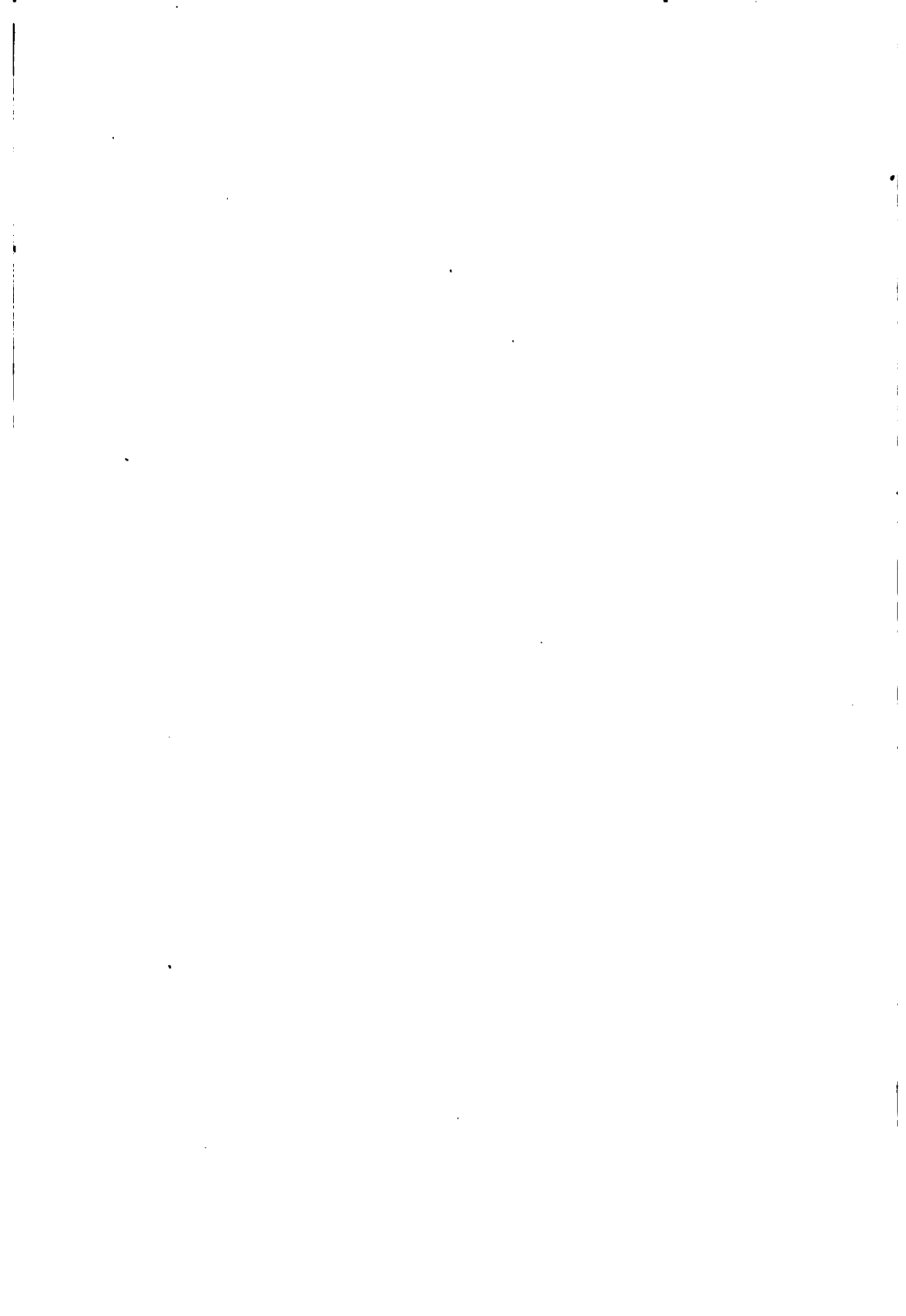
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MINNESOTA REPORTS

VOL. 149

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

APRIL 22 —JULY 15, 1921

HENRY BURLEIGH WENZEL
REPORTER

LAVALLEE LAW BOOK CO.
SAINT PAUL
1922

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THE SUPREME COURT
OF MINNESOTA
DURING THE TIME OF THESE REPORTS**

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By G. S. 1913, § 137, the reporter is required to report all cases decided by the court. The title of each case follows that in the register of actions in the office of the clerk of the court.

Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.

With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of the court.

As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.

In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.

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BY ORDERS MADE IN OPEN COURT, THE OPINIONS
WRITTEN BY THE COMMISSIONERS AND REPORTED IN
THIS VOLUME WERE ADOPTED AS THE OPINIONS OF
THE COURT BEFORE THEY WERE FILED, AND HAVE
THE SAME FORCE AND EFFECT AS THOUGH WRITTEN
BY A JUSTICE OF THE COURT.

FOR TABLE OF STATUTES CITED BY THE COURT
SEE INDEX, PAGES 562—565

Rules of the Supreme Court

FOR

Admission to the Bar

ORDERED, That the following rules for the examination and admission of persons to practice as attorneys at law in all the courts of record of this state be and the same are hereby prescribed and adopted in pursuance of the provisions of Chapter 161 of the General Laws of Minnesota for 1921, the same to become effective on this 1st day of October, 1921.

RULE 1. The State Board of Law Examiners shall consist of five members. The board shall elect a president and secretary from among its members.

RULE 2. The fee for the privilege of taking an examination shall be twenty-five dollars, payable in advance. The same fee shall be paid by one who under the rules is entitled to be admitted to practice without passing an examination.

RULE 3. No person shall be admitted to practice law who is not at least twenty-one years of age, a citizen of the United States, and a resident of this state.

RULE 4. Proof of moral character shall be a prerequisite to admission.

If the applicant is an attorney from another state or territory, or from the District of Columbia, such proof shall consist of the certificate of a judge of a court of record, and of two practicing attorneys of such state, territory, or district, that the judge and attorneys so certifying are well acquainted with such applicant and that he is a person of good moral character. There shall also be a like certificate from two practicing attorneys of this state.

If the applicant is not an attorney, such proof shall consist of the affidavits of at least two responsible persons of the town or city where

he resides, setting forth how long a time, when, and under what circumstances the persons making the same have known the applicant, and such further details respecting his habits and general reputation as the board may require to determine the moral character of the applicant. In obtaining the required information, the board will obtain the aid of the officers or committees of bar associations whenever available. Each applicant shall file with the secretary of the board, at least thirty days before he takes his examination and in such form as the board shall prescribe, an application for leave to take the examination.

RULE 5. Attorneys of other states, territories, or the District of Columbia who have been actively engaged in practicing law for at least three years next preceding their application for admission to practice in this state, may be admitted without examination in the discretion of the board.

If of less than three years standing, an attorney from another state or a territory or the District of Columbia who has studied law either in a law school or in the office of a practicing attorney, or both, for a period of not less than three years, and who shall have spent six months in study in the office of a practicing attorney in this state, may be examined for admission as hereinafter prescribed.

Any person not an attorney, who shall have studied law for the period of three years during the four years immediately preceding his application for examination either in a law school having a course of study and instruction which meets with the approval of the board, or in the office of a resident practicing attorney, or both, may be examined by the board as hereinafter prescribed.

A graduate of an approved law school applying for admission shall present his diploma or proof that he has one to the secretary of the board. An applicant who is not a graduate but who has studied at an approved law school shall present a certificate from the dean or secretary of the law school, showing the period he has studied and that he has passed examinations in all the subjects covered by his studies. If the applicant has been a student in the office of a practicing attorney, he shall present

proof satisfactory to the board that his study and preparation has been adequate and under proper supervision.

RULE 6. Applications for admission to practice shall be in writing, shall be signed by the applicant, and shall state his name, age, occupation, if any, present residence, place of residence during the preceding five years, the nature of his general education, in what educational institution it was pursued and the time spent therein, together with such additional information as may be required by the board.

All applicants except attorneys of three years standing shall also state where and during what time they have studied law, the name of each law school they have attended, if any, and of every attorney in whose office they may have studied and the subjects studied and for what period of time.

If the applicant be an attorney from some other state, or a territory, or the District of Columbia, he shall present to the secretary, with his application, his certificate of admission to the bar therein, together with a certificate from the proper court thereof that he is in good standing and not under pending charges of misconduct.

Under such regulations as it shall prescribe and at least twenty days before the board shall issue its certificate to any applicant who shall have passed the examination, it shall cause the name of such applicant to be published in a newspaper of the county in which the applicant resides.

RULE 7. The general educational qualifications of applicants shall be established either by the presentation to the board of a diploma from a high school giving a four years course, or by producing evidence satisfactory to the board that the applicant has the mental training and education needed creditably to enter the practice of law. Until such qualifications have been established, no applicant shall be permitted to take an examination for admission to practice.

RULE 8. All applicants for admission shall be required to pass a satisfactory examination in all of the subjects listed below as "Required Subjects" and in six of the subjects listed below as "Electives," each applicant

being permitted to select for himself the six electives in which he wishes to be examined.

Required Subjects:

Constitutional Law.
Property—Real and Personal.
Contracts.
Torts.
Negotiable Instruments.
Sales.
Corporations—Municipal and Private.
Equity Jurisprudence.
Domestic Relations.
Wills and Administration.
Minnesota Pleading and Practice.
Evidence.
Criminal Law and Procedure.
Legal Ethics.

Electives:

Partnership.
Agency.
Bailments and Carriers.
Mortgages.
Suretyship.
Damages.
Insurance.
Taxation.
Landlord and Tenant.

RULE 9. Examinations shall be held three times a year, one to be held during the last week of June. They shall be conducted at the State Capitol. Three days shall be given to each examination, two to written and one to oral examinations. Each member of the board shall

be present at the oral examinations unless unavoidably absent for a cause not within his control. The written examinations shall be personally conducted by one or more of the members of the board.

RULE 10. An applicant who has failed to pass and who must be re-examined in all or a majority of the required subjects shall not be permitted to take another examination until one year after the examination at which he failed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA

MARY HINCHUK, FORMERLY MARY BUSH
v. SWIFT & COMPANY.¹

April 22, 1921.

No. 22,804.

Workmen's Compensation Act — injury inflicted in quarrel over work.

1. An employe injured during the course of his employment, though by the wilful act of a coemploye, is within the compensation act, if there is some causal relation between the employment and the injury, that is, if the injury be one which may be seen to have had its origin in the nature of the employment. An injury inflicted by a coemploye as a result of a quarrel over the manner of doing their work is within the rule.

Same — wife conclusively presumed dependent on her husband.

2. Under our statute a wife is conclusively presumed to be wholly dependent upon her husband, unless voluntarily living apart from him. The trial court found that plaintiff was so dependent. Applying the rule stated in *State v. District Court*, 142 Minn. 335, it is *held* that the finding is sustained.

Upon the relation of Swift & Company, the supreme court granted its writ of certiorari directed to the district court for Ramsey county and the Honorable Hugo O. Hanft, one of the judges thereof, to review the judgment in that court in proceedings brought under the Workmen's

¹Reported in 182 N. W. 622.

Compensation Act by Mary Hinchuk, widow of Alex Bush, employe, against relator employer. Affirmed.

Barrows, Stewart & Metcalf, for relator.

Drill & Drill, for respondent.

HALLAM, J.

1. This case arises under the Workmen's Compensation Act. Alex Bush was in the employ of defendant at its packing plant at South Saint Paul. He and a workman named Harper were engaged in trucking meat to a washing machine. When the truck reached the machine it was unloaded piece by piece. Two men worked together on a truck. One would pull and the other would push and the fair way was to take turns. Bush and Harper quarreled over the moving of the truck, each claimed he was being compelled to do more than his share. The testimony is somewhat in conflict, but one witness testified that they quarreled over who should push and who should pull the truck. Finally Bush took the handles and pulled and Harper pushed. When they reached the washing machine they quarreled some more, each calling the other names. When they finished the argument Bush started to work unloading meat, but Harper walked 12 or 15 steps away, picked up a piece of iron pipe that lay there and struck Bush over the head and caused his death. The trial court allowed compensation under the statute.

The statute is that compensation shall be paid by the employer "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment." G. S. 1913, § 8203. The word accident is defined to mean "an unexpected or unforeseen event, happening suddenly and violently, with or without human fault and producing at the time, injury to the physical structure of the body." G. S. 1913, § 8230(h). The act is declared not to "include an injury, caused by the act of a third person or fellow employe * * * because of reasons personal to him, and not directed against him as an employe, or because of his employment." G. S. 1913, § 8230(i).

Section 8230(h) gives us no trouble. Section 8203 and section 8230(i) taken together may clearly include an injury inflicted by the wilful act of another. See *State v. District Court of Koochiching County*,

134 Minn. 16, 158 N. W. 713, L.R.A. 1916F, 957; State v. District Court, Hennepin County, 140 Minn. 75, 167 N. W. 283, L.R.A. 1918E, 502. This is the prevailing construction of similar statutes as applied to cases similar to this.

In *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530, two employes, in culling barrel staves, became involved in a dispute because one took staves from the rack of the other. One injured the other. Compensation was allowed.

In *Swift & Co. v. Industrial Commission*, 287 Ill. 564, 122 N. E. 796, an employe whose duty it was to repair leaks in steam pipes in a large packing plant was injured in a fight with the foreman of a department to which he had been summoned, the altercation growing out of matters connected with the injured employe's work. The statute was held to apply.

In *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750, L.R.A. 1917A, 344, claimant, employed as a driver by a brewing company, took exception to the manner in which a fellow workman washed off the horses. A quarrel ensued, and, in physical encounter that grew out of it, claimant was injured. Held, entitled to compensation.

In *Polar Ice & Fuel Co. v. Mulray*, (Ind. App.) 119 N. E. 149, an employe of an ice company, employed to check and collect for shortage of drivers, was shot and killed by a driver as a result of a quarrel over collections. Compensation was allowed.

In *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 151 Pac. 398, a worker on a railroad section was told by the foreman to drop his shovel and get his time, but the man refused and the foreman undertook to take his shovel from him and was injured. Compensation was allowed.

In *M'Intyre v. A. Rodger & Co.* 41 Scot. Law Reporter, 107, two workmen engaged in a tussle over the possession of a brush to be used in the work and one was injured. The statute was held to apply.

The principle applicable to such cases is that the injury is included within the statute, if there is some causal relation between the employment and the injury. Not that the injury must be one which ought to have been foreseen, but it must be one which, after the event, may be seen to have had its origin in the nature of the employment.

This is such a case. Bush and Harper became involved in a quarrel over the manner of doing the work in which they were jointly engaged. There was no personal antipathy. Differences over the work caused the whole trouble. The trial court evidently took the view that there was no real cessation of hostilities from the time trouble started until it was over. We think the evidence sustains this position and that the court properly held the case to be within the statute.

2. Defendant contends that plaintiff was not a dependent and not entitled to compensation under the statute. As the wife of deceased she is conclusively presumed to be wholly dependent upon him, unless she was "voluntarily living apart" from him at the time of his death. G. S. 1913, § 8208, as amended by Laws 1915, p. 285, c. 209. See *State v. District Court of Ramsey County*, 137 Minn. 283, 163 N. W. 509; *State v. District Court of Hennepin County*, 139 Minn. 409, 166 N. W. 772. Defendant pleaded and undertook to prove that plaintiff was voluntarily living apart from her husband. The court found that plaintiff was the sole dependent of deceased. This necessarily negated defendant's contention. Defendant contends that this finding is not sustained by the evidence. Deceased was injured on January 2, 1918, and died January 5. Shortly before this plaintiff left the family home and went to Milwaukee. She testified through an interpreter. When asked: "How long have you been in Milwaukee?" she answered: "Four weeks." The question referred to the time before her husband died. Perhaps she so understood it. Another witness, however, testified that plaintiff went to Milwaukee after Christmas and returned January 20, a period of about four weeks all told. On May 29, 1918, plaintiff married John Hinchuk. She bore a child September 24, 1918. The court refused to find that the child was the child of deceased so as to be entitled to compensation.

Defendant claims that the facts are conclusive that she was voluntarily living apart from her husband. There is evidence from which the court might have found that she was. Plaintiff and her husband had gotten along badly together. She had left him many times before, but had always come back. Hinchuk had been the occasion of some trouble between them. There is evidence of an admission on her part that she met him while she was in Milwaukee. The birth of her child on Sep-

tember 24 and her marriage to Hinchuk in May are both circumstances sustaining the theory of abandonment of her husband before his death. On the other hand, she testified positively that there had been no separation; that she went to Milwaukee to visit a cousin; that her husband knew of her going and consented and gave her money to pay her way and was providing her with her means of living, and that she had never had illicit relations with Hinchuk.

We are of the opinion that the evidence is not conclusive that plaintiff was voluntarily living apart from her husband at the time of his death. This court on appeal in compensation cases does not weigh the evidence and declare the preponderance thereof. If the evidence is such that reasonable minds may reach different conclusions, the question becomes one of fact and the finding must be sustained. State v. District Court of Ramsey County, 142 Minn. 335, 172 N. W. 133. There is evidence sufficient to sustain the finding of the trial court.

Affirmed.

STATE v. A. C. TOWNLEY AND ANOTHER.¹

April 29, 1921.

No. 22,086.

Conspiracy to discourage enlistment.

1. To establish a charge of a conspiracy to violate chapter 463, Laws 1917, the state must prove that defendants had concerted to teach that men should not enlist in the military forces of the United States or aid in carrying on the war with Germany. A combination for an unlawful purpose is the foundation of the offense and an overt act in furtherance of such purpose completes the offense. All who are parties to the combination incur guilt when one does such an act. The combination need not be established by direct evidence, but may be inferred from circumstances.

Conviction supported by evidence.

2. The evidence, direct and circumstantial, was sufficient to support the verdict.

¹Reported in 182 N. W. 773.

Conviction not reversed on appeal for technical errors.

3. If guilt is clearly established, a criminal conviction will not be reversed for technical errors, where the substantial rights of the accused have not been so violated as to make it reasonably clear that a fair trial was not had.

Separate trials of defendants jointly indicted.

4. It is discretionary with the trial court to grant separate trials of defendants jointly indicted for a misdemeanor.

Cross-examination not unduly restricted.

5. Defendants were not unduly restricted in their cross-examination of the state's principal witness.

Reasons for change of sentiment of witness for state.

6. The reasons for a change from friendly to unfriendly sentiments on the part of a witness for the state having been inquired into on his cross-examination, it was not error to permit the state to further develop the subject within reasonable limits.

New trial because of doubtful relevancy of evidence.

7. The admission of evidence of doubtful relevancy, is not alone sufficient ground for a new trial, where there was ample competent evidence to warrant the jury's conclusion respecting defendants' guilt.

Rulings on evidence.

8. There were no errors in rulings admitting or excluding evidence.

New trial because of misconduct of court or counsel.

9. Defendants are not entitled to a new trial on the ground of misconduct on the part of the court or opposing counsel.

Requests for instructions submitted near end of argument.

10. It was within the discretion of the trial court to receive and consider defendants' requests for instructions not submitted until near the end of the argument of the prosecuting attorney, notwithstanding the request of the court, made several days before, that the attorneys present their proposed instructions in time to enable the court to consider them. Section 7802, G. S. 1913, is applicable to the trial of criminal as well as civil actions.

Accused not to make unsworn statement to jury.

11. Since the accused may now testify in his own behalf, if he desires, the courts should no longer follow or recognize the practice obtaining at common law of permitting him to make an unsworn statement to the jury at the close of the case.

Accused not to make closing argument after colorable discharge of counsel.

12. There is no constitutional provision conferring upon the accused the right to make the closing argument to the jury in his own behalf. He is guaranteed the right of having the assistance of counsel for his defense, and counsel cannot be imposed upon him against his will, but, if he elects to be represented by counsel who conduct the defense until the time comes to make the argument to the jury, he cannot ostensibly discharge them and then insist on making the closing argument himself, especially where he did not take the stand as a witness. It is within the discretion of the trial court to permit him to do so, and, under the facts disclosed by the record, it did not abuse its discretion in refusing such permission.

After the former appeal reported in 142 Minn. 326, 171 N. W. 930, the case was tried before Dean, J., and a jury, and defendants were found guilty as charged in the indictment. From an order denying their motion for a new trial, defendants appealed. Affirmed.

George Hoke, George Nordlin and Vince A. Day, for appellants.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *E. H. Nicholas*, County Attorney, for respondent.

LEES, C.

Defendants were indicted in Jackson county in May, 1918, on a charge of criminal conspiracy. The substance of the indictment and the questions raised by their demurrer to it are reported in *State v. Townley*, 142 Minn. 326, 171 N. W. 930. Defendants were brought to trial in June, 1919. The trial lasted three weeks and resulted in a verdict of guilty. They moved for a new trial. On July, 1920, their motion was denied and they appealed, specifying 102 alleged errors. Some of the assignments are not of sufficient importance to justify discussion, but none have escaped our careful consideration. Some have been combined for examination and others will be considered separately.

1. The objections to the constitutionality of Chapter 463, p. 764, Laws 1917, which are first in order, were disposed of in *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790, affirmed in *Gilbert v. Minnesota*, 254 U. S. 325, 41 Sup. Ct. 125, 65 L. ed.

¹Reported in 182 N. W. 773.

2. To establish the guilt of the defendants, the state was required to prove that they had conspired to teach or advocate that men should not enlist in the military or naval forces of the United States, or that citizens of Minnesota should not aid the United States in carrying on the war with Germany, and that some act had been done by one or both to effect the object of the conspiracy. Sections 8595, 8596, G. S. 1913.

The combination of two or more minds in an unlawful purpose is the foundation of the offense, but an overt act in furtherance of the common purpose is necessary to complete it. The statement to the contrary in *State v. Pulle*, 12 Minn. 99 (164), is no longer the law in view of the provisions of the statute. All who are parties to the combination incur guilt when any one of them does an act to further the purpose of the unlawful confederation. *State v. Thaden*, 43 Minn. 253, 45 N. W. 447; *State v. Palmer*, 79 Minn. 428, 82 N. W. 685; *State v. Dunn*, 140 Minn. 308, 168 N. W. 2; *State v. Lyons*, 144 Minn. 348, 175 N. W. 689; *Hyde v. U. S.* 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114, Ann. Cas. 1914A, 614.

The combination need not be established by direct evidence. It may be inferred from circumstances. No formal agreement to do the acts charged need be shown. Concurrence of sentiment and co-operative conduct and not formality of speech are the essential ingredients of criminal conspiracy. *Redding v. Wright*, 49 Minn. 322, 51 N. W. 1056; *Eacock v. State*, 169 Ind. 488, 82 N. W. 1039; *State v. Caine*, 134 Iowa, 147, 111 N. W. 443; *Marrash v. U. S.* 168 Fed. 225; 93 C. C. A. 511; *Underhill*, Crim. Ev. § 491.

To sustain the charge, the state introduced both direct and circumstantial evidence of the alleged conspiracy and made proof of defendants' acts alleged to have been done in furtherance of it. Those done in Jackson county were the acts of Gilbert alone, for it does not appear that Townley was ever in that county prior to the return of the indictment, but nevertheless the venue might properly be laid in Jackson county. *Hyde v. U. S.* supra.

The direct evidence of conspiracy consisted of the testimony of one F. A. Teigen, which in substance was as follows: He made Townley's acquaintance at Fargo in the winter of 1916, and Gilbert's at St. Paul somewhat later. They employed him as an organizer, under a contract

running for one year, to procure members of the Nonpartisan League and to collect membership fees. Before he was employed, Townley told him he had conceived of and built the league himself and had the final decision as to its policy. Defendants were together at league headquarters in St. Paul, where both had offices. Townley was president and Gilbert had charge of the organization work of the league. Teigen took orders from both. He discussed with Townley a speech which one Van Lear made at a meeting in his territory, and asked whether he should participate in another meeting at which Van Lear was to speak. Townley replied that the Van Lear speech was a "cracker-jack," and in the same connection said: "We are against this God-damned war, but we can't afford to advertise it." He advised him not to take part in the proposed meeting. Teigen had prepared a speech which he intended to deliver, and discussed it with defendants. Gilbert thought it was all right, but Townley said it was too direct, that it should be camouflaged a little, and added:

"Don't write or say or do anything that they can get you for, that is, any open opposition to the war. It is far better to let your position be known and understood by indirect methods."

Late in the summer of 1917, letters of instruction were mailed to league organizers, expressing loyal sentiments. Townley told Teigen they were sent out to show that the league was patriotic, but that the real instructions would come by word of mouth from traveling agents. Gilbert expressed opposition to all wars, on principle. Townley's opposition was based on policy rather than principle. Both told Teigen that the cost of the war should not be met by the sale of bonds—that it was absolutely wrong, a mistaken policy on the part of the government. In the fall of 1917 Gilbert informed Teigen that the Public Safety Commission had asked that his further services be dispensed with. Townley said to him:

"Somebody has got to be sacrificed to appease them and you are the man that they are very bitter against so we have got to discharge you.
* * * And I am going out, I have got to go out. I am compelled to, and make patriotic speeches, and I have ordered all of the other men
* * * to do the same thing, because if we don't they are going to get us."

Gilbert admitted that he had talked with Teigen about the war, expressing his personal opinion, but denied that he told him what to teach. He admitted that Teigen had shown him his proposed speech, but denied that he had approved of or discussed it with Townley. He also admitted that he had signed Teigen's contract in behalf of the league.

Townley did not testify.

The sum and substance of Teigen's testimony was that the defendants were in accord in their purpose to discourage the prosecution of the war; that they planned to oppose it and to use their organization to accomplish that end. Defendants characterize his testimony as a tissue of falsehoods. Granting that he is a man of doubtful veracity and the defendants' enemy, it nevertheless appears that defendants did and said in public substantially what he asserts they told him in private they were going to do and say. Their conduct and utterances square with his testimony and lend it credit, which otherwise it might not be entitled to receive. The jury who heard him testify, and saw him undergo a searching cross-examination, were evidently convinced that he was not unworthy of belief.

The relations of the defendants to each other and to the organization they were promoting, the printed matter they distributed, and their public speeches, comprise the circumstantial evidence of the existence of the alleged conspiracy. This was the situation: When the United States declared war, defendants were, and for some time had been, engaged in enlarging the membership and field of activity of the Nonpartisan League. It was a political organization, seeking to gain control of the government of a number of states, in order to put through an economic program advocated by its leaders. Defendants were conspicuous and influential members of a small group of men who controlled the organization. The entry of the United States in the war interfered with their program and naturally diverted public attention to greater and more momentous issues than the alleged economic grievances of the class of citizens which the organizers of the league proposed to redress. It was inevitable that during the continuance of the war a consideration of these grievances would be postponed. The war was unpopular in many localities. It would be easier to sell memberships in such localities, if the impression prevailed that the officers of the league proposed to use the influence of

a powerful organization to keep young men from being sent overseas.

Soon after war was declared a pamphlet was printed and placed in the hands of the league's field workers. It was composed of three distinct parts. The first sets forth the league's origin and method of operation; the second contains resolutions on the war adopted by the league, and the third states the principles of the league. It was prepared at Gilbert's suggestion, to be used in getting members, and he admitted that he was absolutely in accord with the ideas expressed in it. There can be no reasonable doubt that Townley, as president of the league, was cognizant of the pamphlet and its circulation, and the inference is that he approved of it. The war resolutions contained in it are set out in *State v. Townley*, 140 Minn. 413, 168 N. W. 591, where it was held that they did not violate chapter 463, p. 764, Laws 1917. They were, however, a criticism of the policy of conscripting men and not wealth, and of the alleged unwarranted interference of military authority with the rights of individuals. We are of the opinion that the pamphlet was properly received in evidence. *Pierce v. U. S.* 252 U. S. 239, 40 Sup. Ct. 205, 64 L. ed. 542.

Defendants made numerous speeches in different parts of the state during the summer and fall of 1917 and the winter of 1918. Occasionally both were present at the same meeting. Both participated in and spoke at one held in St. Paul in September, 1917. Some of their speeches are contained in the record. Among them is Gilbert's Kenyon speech, referred to in the opinion in *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790, affirming his conviction for a violation of chapter 463. In *Gilbert v. Minnesota*, 254 U. S. 325, 41 Sup. Ct. 125, 65 L. ed. —, Mr. Justice McKenna, speaking for the Supreme Court of the United States, in sustaining the decision of this court, said [page 333]:

"Gilbert's speech had the purpose they (the sections of the statutes) denounce. The nation was at war with Germany, armies were recruiting, and the speech was the discouragement of that. * * * Every word that he uttered in denunciation of the war was false, was deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted. He could have had no purpose other than that of which he was charged."

On January 18, 1918, a letter was addressed and sent to A. E. Bowen,

an officer of the league. It was signed by the county director of public safety for Jackson county and by the sheriff. It requested Bowen to keep league speakers out of the county, stating that any attempt to hold further league meetings in the county would be likely to result in disturbances, and that every measure at the disposal of the writers would be used to prevent such meetings. It was written in response to a letter from Bowen announcing a league meeting in Jackson county on January 23. Taking the letter with him, on that day Gilbert went to Lakefield, where the meeting was to be held. He met a number of county officials, including the sheriff. Exhibiting the letter to them, he said he was the manager of the league, and deemed the matter referred to in the letter so important that he had come himself rather than send a subordinate. He was informed that a league organizer named Freitag had been going about the county holding meetings and influencing people in such a way that it was hard to get them to buy Liberty bonds. He replied that he was not responsible for what organizers did; that he was going to hold a meeting; that the authorities would have to arrest him if they intended to stop him; that he had been sent down to test the law; that the case would be carried to the highest court in the land, and that they had plenty of money to do it. He then proceeded to make his speech, but before he concluded he was placed under arrest. The speech was of the same general nature as his Kenyon speech. The sheriff testified that in substance Gilbert said that

"The boys of the farm * * * should be left on the farms, that they are better off on the farms than they are in the trenches five thousand miles away. Who is going to feed them when they are five thousand miles away? You farmers have worked harder than ever before. You have had to subscribe to the Liberty Loan, Y. M. C. A., and to the Red Cross; and on top of all that, now they take your boys away. When the government conscripted your boys, they didn't conscript wealth. If they had, we wouldn't have to have wheatless days and meatless days, and heatless days. * * * Men had never been drafted to be sent across the sea to fight. * * * The county officials were a lot of * * * flag-wavers and that they wrapped themselves up in the Stars and Stripes and spelled their patriotism with big letters P-A-Y."

The man Freitag, referred to in the Bowen letter, was a league or-

ganizer working in Jackson county. In soliciting members, he said in substance that the war was a moneyed man's war; that if it wasn't for money we wouldn't be at war; that a meeting had been called to send a petition to the government to keep the boys from being sent across to fight. At a public meeting at Sioux Valley, he said England and France were bankrupt and this country soon would be if it kept on spending such large sums of money, and advised farmers not to invest in Liberty bonds, but in elevators, flour mills and things essential to their interests. This was just before the probate judge of the county made a speech urging the purchase of Liberty bonds.

Townley's speeches bear a marked resemblance to Gilbert's, both in the ideas expressed and the language used, though he was not so outspoken. His St. Paul speech in September, 1917, is referred to by his counsel as typical of his speeches in general. In the course of that speech, referring to the steel, packing and milling business, he said:

"Take as much profit out of their business as has been taken out of the business of raising wheat in the northwest. * * * Now, as soon as you do that, nobody will want to continue the war any longer unless to secure liberty and democracy. * * * Fix a price on steel on the same basis and by the same power as you have fixed the price on the farmer's wheat * * * and this patriotic corporation won't want to continue the war except for liberty and democracy. * * * If your government * * * should be able to fix the price of steel and flour so that those gentlemen would make no more * * * than the farmer is making out of wheat, I'm afraid that the Minneapolis Journal would be one of the worst slackers in the whole United States."

In another portion of this speech, he said:

"We got the government control too largely into the hands of the profiteers. They are today influencing this government in too large a measure. * * * An influence so large that they can say * * * we are going to have forty billions of dollars to spend here to prosecute this war. Now, how much have we got to pay the farmers for wheat to keep bread in the boys' stomachs? All that we don't have to pay for wheat to keep bread in the boys' stomachs we can use to pay profits to ourselves."

In another portion, he said:

"The kept press, the newspapers owned by those who make four or five billion dollars, and the mouths of some gentlemen have been very full of profession of their patriotism, but too many of those professions of patriotism come from men whose pockets bulge with the gold they stole from us. They are not patriots because they possess billions and billions of war profits wrung from the agony and sweat and toil of men and women. The possession of these billions of dollars of war profit in the pockets of these profiteers, their arms red to the elbows in the blood of this nation, is proof that they are not patriots. * * * Then, in a time of the world crisis, in a time of the nation's need, if they are not patriots, what in hell are they? Who has a German helmet placed upon their heads and you see the Kaiser himself."

In a speech at New Ulm in June, 1917, he said:

"Then they ask us to purchase Liberty bonds? How about that \$4,000,000,000 in excess profits the people of this country have paid? * * * This is double the size of the Liberty bond quota. The people of this country are paying tribute to the gamblers on account of war and then are asked to pay for the war besides. * * * I say that we must free this country from autocracy before we go to Europe to do the same thing. * * * I don't believe it is right to give the best lives of the nation, and at the same time put the nation millions in debt; and ask these boys to come back and work long years to pay off the war debt. * * * When the war is over these young men will come back * * * with limbs gone, deaf, dumb, blinded, insane for life. Hundreds of thousands more, millions, will not come back at all. * * * So we propose that, as there is a God in heaven, these men are not coming back maimed and in poverty to pay off this horrible war debt; we will not shoulder on their backs this great burden. We will take the surplus wealth of the country now and use it for the war, and when the war is over we will give back what is left, and clean the slate. * * * We must destroy American autocracy in this country before we attempt to relieve the people of Europe of the oppression of German autocracy. * * * I am for liberty and for democracy, but not for a war to submit a people to robbery by a financial autocracy. * * * It is time for the American people to wake up and kick out this autocracy of

wealth which has fastened its clutches on the throat of liberty in this country. After this operation is completed it is time to talk of freeing Europe of German autocracy."

He further said:

"The government says you have to go across the seas to fight, and of course you will have to go and many of you will sacrifice your lives. Some of you will come back maimed and blind and your life will be destroyed, but why don't they draft the Big Biz? I say before we let you go over there, they should draft Big Biz into it and then there would be no fight."

In a speech at Glencoe in June, 1917, he said:

"I am afraid that if the nation should come to the * * * big corporations and want those who are making millions of wealth to give over their surplus I am afraid it might dampen their ardor for war a little bit. I am a little bit afraid that there might not be much of a war. * * * There is no reason why we should pay after the war is over some billions of dollars to the war profit when we are sending our boys over to die. Let's see whether this is right, to take our surplus wealth to finance this war. The rich man is not going to go, he is making the rules of the game. * * * We propose that this nation shall take so much of the surplus of this wealth of our nation and use it now and when the war is over give back as much of the wealth as is left and no more."

In a speech at Cambridge in February, 1918, he said that the war "was a rich man's war and for the benefit of the rich. * * * If the rich had to pay their proportionate share * * * with the farmer or poorer class, the war wouldn't last very long. * * * It wasn't right that we should send our boys over there to fight other people's battles."

These statements were intermingled with others pointing to the duty of every American citizen to support his government. No exception can be taken to many of the things he said, but his speeches are to be read as a whole. So read, the good in them is more than nullified by the bad. It is urged that they contained nothing calculated to discourage enlistments. Doubtless their only effect on right-thinking men was to excite their indignation, but with men who did not know why the United

States had engaged in the war and who were credulous enough to believe these statements, and especially among those who did not favor our entry in the war, they could have but one effect—the discouragement of enlistments and of subscriptions to government bonds.

When Teigen's testimony, if true, and the admitted acts and utterances of the defendants are put together, defendants' guilt is clearly established. We are of the opinion that the evidence to support the verdict is ample and that defendants are not entitled to a new trial on the ground that a conspiracy was not proved.

The remaining assignments all relate to errors of law alleged to have occurred in the course of the trial. In considering them, we apply the rule that a criminal conviction will not be reversed for technical errors where the substantial rights of the accused have not been so violated as to make it reasonably clear that a fair trial was not had, where, as here, the guilt of the accused is clearly established. *State v. Nelson*, 91 Minn. 143, 97 N. W. 652; *State v. Crawford*, 96 Minn. 95, 104 N. W. 768, 822, 1 L.R.A. (N.S.) 839; *State v. Williams*, 96 Minn. 351, 105 N. W. 265; *State v. Brand*, 124 Minn. 408; 145 N. W. 39; *State v. Jacobson*, 130 Minn. 347, 153 N. W. 845; *State v. Price*, 135 Minn. 159, 160 N. W. 677.

3. A separate trial of each defendant jointly indicted for a misdemeanor is discretionary with the court. G. S. 1913, § 9202; *State v. Sederstrom*, 99 Minn. 234, 109 N. W. 113. There was no error in the denial of defendants' request for such a trial.

4. The letter to Bowen was properly received in evidence. Gilbert had it in his possession when he went to Lakefield to speak. It furnished the occasion for his going there and he took some of the statements in it as the text for his speech. It threw light on the meaning and purpose of his utterances.

5. Freitag's statements, while soliciting members and making speeches in Jackson county, were properly received. True, he was only an organizer and not a party to the conspiracy, but defendants were not charged with criminal responsibility for what he said. Organizers received instructions from headquarters. According to Teigen, Townley decided what the instructions should be and Gilbert was in charge of the organization work. Freitag's talk expressed the same ideas as de-

defendants' speeches, but in less guarded language. The jury might properly infer that he was their mouthpiece and that his utterances indicated a concerted purpose on their part to discourage enlistments and the purchase of government bonds.

6. Calling attention to *State v. Townley*, 140 Minn. 413, 168 N. W. 591, defendants contend that the pamphlet put out by the officers of the league should not have been received in evidence. The question before the court in that case was whether the circulation of the pamphlet constituted a violation of chapter 463, p. 764, Laws 1917, with which defendants were charged. The present prosecution is for a conspiracy to violate that statute. In *State v. Townley*, 142 Minn. 326, 171 N. W. 930, we held that the indictment, under which the defendants have been tried and convicted, charged a conspiracy to violate the statute in question and not its actual violation. The circulation of the pamphlet was merely one of the acts done in furtherance of the conspiracy. Such an act need not amount to a crime. If that were so, no conspiracy to commit a crime could ever be punished, unless the conspirators actually committed it. *U. S. v. Rabinowich*, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. ed. 1211; *Pierce v. U. S.* *supra*.

7. Defendants insist that they were unduly restricted in their cross-examination of Teigen. His feelings and disposition to tell or conceal the truth were proper subjects of inquiry, *Alward v. Oakes*, 63 Minn. 190, 65 N. W. 270, but the extent of the inquiry is largely within the discretion of the trial court. *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690; *State v. Nelson*, 148 Minn. 285, 181 N. W. 850; *Underhill*, Crim. Ev. § 221. The cross-examination brought out the fact that, after he was discharged as a Minnesota organizer in the fall of 1917, Teigen published a book hostile to the league and its officers; that in June, 1919, he was employed as a league organizer in Wisconsin; that he had been jailed there on some charge made by a Wisconsin officer of the league; that within a few days after his release he sent a telegram to the county attorney, informing him where he was, and voluntarily came as a witness for the state at the county attorney's request. He was asked about his relations with prominent men in St. Paul and Minneapolis and whether they had paid or promised to pay him large sums of money for writing his book. Objections were sustained to this line of questions. Specifying

time and place, he was then asked whether he had not stated to three different men—Sullivan, Paddock and Anderson—that he was getting money from the enemies of defendants and that they still owed him a considerable sum. This he denied. Sullivan and Paddock later testified that he had made such statements. Anderson was also called as an impeaching witness. It developed that he was not the Anderson referred to when defendants were laying their foundation for impeachment. Permission to recall Teigen for further cross-examination, in order to lay such foundation, was refused. Before the cross-examination was concluded, Teigen's antecedents had been laid bare and his unfriendliness to defendants had been established. The trial court might well have permitted his recall to lay a foundation for impeachment by the witness Anderson, but we cannot say there was an abuse of discretion in refusing to permit it, or that Anderson's testimony would have added much to the weight of Sullivan's and Paddock's.

8. The state's witness Liesch published two newspapers in New Ulm. On cross-examination he was asked whether they were for or against the Nonpartisan League, and answered that they were for it up to 1917, but not thereafter; that the league had boycotted them, which was decidedly offensive to him; and that he was also hostile to the league because of its stand on the war. On redirect examination he was asked what other reasons there were for his change of sentiment towards the league. Over defendants' objection, he answered that he believed the league was managed by Socialists who were hostile to the war and that some of its members had not supported the government during the war. Citing *State v. Kight*, 106 Minn. 371, 119 N. W. 56, and *Town of Wells v. Sullivan*, 119 Minn. 389, 138 N. W. 305, defendants contend that the court erred in permitting these answers to be given. The witness' reason for unfriendliness to the league was first inquired into on cross-examination. Having gone into the subject, defendants were not in a position to object to its further development by the state within reasonable limits. *Mix v. Ege*, 67 Minn. 116, 69 N. W. 703; *Backus v. A. H. Barber & Co.* 75 Minn. 262, 77 N. W. 959; *Dole v. Wooldredge*, 142 Mass. 161, 7 N. E. 832; *Greenleaf*, Evidence, § 468.

9. The state introduced evidence of a speech made by defendant Townley at Stillwater in February, 1919. The point of the speech was

that a bill then pending in the Minnesota legislature, to prohibit the carrying of the red flag, indicated an excited state of mind on the part of some people, and that the red flag was the emblem of oppressed people and of Russia. At this point the speaker was interrupted and the speech came to an abrupt end. It is difficult to see the relevancy of this, but, conceding that the evidence was not properly admissible, we think this is not alone a sufficient basis for a new trial, for the reason that there was ample competent evidence to warrant the conclusion arrived at by the jury. *State v. Crawford*, supra.

10. Defendant Townley was not prejudiced by the exclusion of the speeches he offered in evidence. It is not seriously asserted that they differed substantially from those that were put in evidence by the state. On the contrary, in offering them defendants' counsel stated that they were substantially the same as the St. Paul speech made in September, 1917. That speech was in evidence. Knowing what was said in it, the jury knew what was said in the others. It is urged that the other speeches had a bearing on the question of Townley's intent in making those which the state introduced. The intent with which the speeches were made was immaterial. They were admissible only as evidence of acts done in furtherance of the conspiracy, not as evidence of a violation of chapter 463. Even if defendants had been charged with its violation, their intent would have been immaterial. *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790.

Reliance is placed on a line of English decisions, holding that in a trial for treason the speeches and publications of the accused showing his loyalty are competent evidence. It is, therefore, asserted that the court erred in excluding Townley's other speeches. A sufficient answer to this is that he was not on trial for treason or sedition.

11. Defendants attempted to prove the authorship of the pamphlet already referred to. Gilbert admitted that he prepared the war resolutions with the exception of one paragraph. Townley did not write any portion of the pamphlet. As we have already pointed out, both defendants authorized or were cognizant of the circulation of the pamphlet. Its circulation, rather than its authorship, was the overt act for which they were responsible, hence the fact that it was largely written by someone else was immaterial.

12. Numerous assignments of error charge the court and counsel for the state with misconduct of so grave a nature as to entitle defendants to a new trial. There were frequent clashes between counsel. As the trial proceeded they became more frequent. Bitterness of feeling was displayed on both sides. At times language was used more appropriate in the arena of political debate than in a court of justice. The trial court was not always successful in promptly stopping the encounters between counsel. We do not attempt to apportion the blame. Doubtless there was provocation on both sides. The incidents of which complaint is made were regrettable. The trial court was of the opinion that they were provoked by defendants' counsel and censured them repeatedly. While we cannot know what effect these incidents had on the jury, it has been our experience that, if the accused and his counsel are treated unfairly by the court or by opposing counsel throughout the trial, the jury is quick to perceive and resent it. The impression we get from the record is that the jury would be apt to conclude that both sides indulged in passages of arms over matters quite foreign to the issues to be determined. Viewed from any standpoint, we do not attach enough importance to the incidents complained of to hold that we are justified in disregarding the conclusion of the trial court that they were not so prejudicial as to entitle defendants to a new trial.

13. Complaint is made of the court's failure to give defendants' requested instructions to the jury. They were not handed to the court until after the county attorney had nearly concluded his argument to the jury. Several days before, the attorneys had been asked to present in advance any requests they intended to make so the court would have time to consider them. The court states that it did not have sufficient time to examine the requests. The statute provides:

"Before the argument begins either party may submit to the court written instructions to the jury * * * and the court, in its discretion, may hear arguments before acting on such requests." Section 7802, G. S. 1913.

The statute relates to the trial of civil actions, but we think it is applicable to criminal actions as well, and that the trial court is not bound to receive or consider requested instructions not presented until after the argument to the jury begins. Especially should this be the rule

where the court has asked counsel to present them seasonably in order that there may be time to consider them. We are aware of the fact that there is a great diversity of judicial opinion on the subject. The rule we adopt is sanctioned by *McFadden v. U. S.* 165 Fed. 51, 91 C. C. A. 89; *State v. Littman*, 86 N. J. Law, 453, 92 Atl. 580; *State v. Claudius*, 164 N. C. 521, 80 S. E. 261; and *State v. Glenn*, 88 S. C. 162, 70 S. E. 453. It has already been announced as applicable in the trial of civil actions in this state. *Gracz v. Anderson*, 104 Minn. 476, 116 N. W. 1116. Of course it does not apply where the court is requested to instruct the jury upon a material feature of the case not covered in the charge as given. *State v. Zempel*, 103 Minn. 428, 115 N. W. 275; *State v. Sailor*, 130 Minn. 84, 153 N. W. 271.

14. After both sides rested, counsel for defendants made the following statement to the court:

"All of the attorneys of record * * * for defendant Townley * * * withdraw from this case and terminate their employment in this case as attorneys for defendant Townley and * * * continuing to represent defendant Gilbert * * * request the court * * * to indicate whether the court will permit one of us to address the jury solely as attorney for defendant Gilbert."

The court ruled that each side would be allowed to make but one argument. When the county attorney had finished his address, the defendant Townley said:

"I am advised that * * * I may dispense with the services of my attorneys and handle my own case. I have done that and I now ask the permission of the court to address the jury in my own behalf, not in any measure representing Mr. Gilbert."

The state objected. Defendants' attorneys announced that they waived their right to address the jury in Gilbert's behalf. The court denied Townley's request. Defendants' counsel then said: "Mr. Gilbert forbids me to argue the case under the circumstances for him." The result was that the case went to the jury without argument in behalf of either defendant. The denial of Townley's request is assigned as error. Two questions are involved: (1) The right of the defendant in a criminal action to make an unsworn statement to the court and jury. (2) His right to make the argument to the jury in his own behalf in a case

where he is represented by counsel who have conducted his defense up to that point.

As to the first, it was the common law rule, at least in capital cases, that the accused was entitled to make an unsworn statement to the jury at the close of the case. 1 Wharton, *Crim. Ev.* § 427; 3 Wharton, *Crim. Proc.* § 1515; 5 *Minn. Law Rev.* 390. The right, according to some of the English decisions, was not absolute, if the accused was defended by counsel. 1 Wharton, *Crim. Ev.* § 427; Archbold, *Crim. Prac.* 196. In some American states there are, or have been, statutes giving the accused this right. *Higginbotham v. State*, 19 Fla. 557; *Blackburn v. State*, 71 Ala. 319, 46 Am. Rep. 323; *Walker v. State*, 116 Ga. 537, 42 S. E. 787, 67 L.R.A. 426; *People v. Thomas*, 9 Mich. 314. The practice originated because, until recently, the accused was not a competent witness in his own behalf. Since he may now testify, if he wishes to do so, there is no longer any reason why he should be permitted to enjoy a privilege which enabled him to tell his story to the jury without being sworn or submitting to cross-examination. *Commonwealth v. McConnell*, 162 Mass. 499, 39 N. E. 107. We, therefore, hold that the accused has no right to make an unsworn statement to the jury.

With reference to the second question, we find no constitutional provision which confers on the accused an absolute right to make the argument to the jury in his own behalf. Attention is called to section 6, art. 1, *Minn. Const.*, but that section merely declares that the accused is entitled to have the assistance of counsel in his defense. Section 4947, G. S. 1913, relating to the practice of law, recognizes the right of a party to appear in his own behalf in courts of record. That right undoubtedly exists independently of the statute. The assistance of counsel cannot be imposed on the accused against his will. 8 R. C. L. 83. But, if he elects to be represented by counsel, he waives his right to be heard himself according to some of the English cases. *Reg. v. Rider*, 8 Car. & P. 539; *The Queen v. Manzano*, 2 Fost. & F. 64; *Reg. v. Beard*, 8 Car. & P. 142. In the first of these cases the court remarked that a prisoner defended by counsel should be entirely in the hands of his counsel, that, if he stated as a fact anything which could not be proved by evidence, the jury should dismiss it from their minds, and, if he merely commented on what was already in evidence, his counsel could do it better

than he could. Other English cases hold to the contrary. See 3 Wharton Crim. Proc. 1515; Archbold, Crim. Prac. 197.

Commonwealth v. McConnell, supra, is the only American case cited to sustain defendants' contention. We are not inclined to follow it under the special facts of this case. Both defendants were represented by three experienced attorneys, who had entire charge of the defense until the time came to make the argument to the jury. At this point Townley ostensibly discharged all of them. We say "ostensibly," because it can hardly be claimed that there was a bona fide termination of their employment. After the verdict was returned the same attorneys again appeared for both defendants, moved for a new trial, had a case settled and allowed, took this appeal and appeared in this court and argued the case for them. At the oral argument we understood counsel to say that their alleged discharge was entered of record, solely to avoid the question that would arise if Townley asked leave to argue his own case while still represented by counsel. Since their discharge was only colorable, we hold that it was within the discretion of the trial court to grant or refuse Townley's request. In the exercise of its discretion, the court might properly take into consideration the fact that a party who has not testified is almost certain, in the guise of argument, to make assertions of fact favorable to his cause, which may properly be made only from the witness stand. It might also consider the circumstances under which the pretended discharge of counsel took place, which indicated an attempt by Townley to gain by subterfuge an opportunity to become at once a witness for himself and his own advocate.

15. Defendants insist that they have not had a fair trial, for the reasons already discussed and for others which we deem of too little merit to justify the further extension of this opinion. They were tried in an agricultural county, presumably by a jury composed in part of farmers. Their speeches had been principally addressed to farmers. Their printed matter was circulated among them. When the jury was impanelled, they announced that they were satisfied with its membership. Their counsel was diligent and earnest in their defense.

It is our conclusion, after a thorough examination of the record, that their guilt was clearly established and that none of the errors of law of which they complain resulted in their being deprived of any of their

substantial rights. Their conviction is, therefore, sustained and the order denying a new trial affirmed.

QUINN-SHEPHERDSON COMPANY v. TRIUMPH FARMERS
ELEVATOR COMPANY.¹

April 29, 1921.

No. 22,159.

Statute of frauds—verbal sale of goods—signature by party to be charged.

In order to recover for the breach of a verbal contract of sale of goods within the statute of frauds, where the memorandum is not signed by the defendant, the writing containing his signature must connect itself with the memorandum, or must with other writings be so connected therewith by reference or internal evidence, that parol testimony is not necessary to establish the connection with the verbal contract of sale, or else, if the signature was not appended to the writing for the purpose of becoming a part of the memorandum, the writing in order to satisfy the statute must clearly admit or confess that a sale was made.

Action transferred to the district court for Martin county to recover \$803.29 for breach of contract. The case was tried before Dean, J., who when plaintiff rested granted defendant's motion to dismiss the action. From the order denying plaintiff's motion for judgment in favor of plaintiff notwithstanding the order for dismissal, or for a new trial, plaintiff appealed. Affirmed.

Cray & Eaton, for appellant.

Allen, Seifert & Allen, for respondent.

HOLT, J.

Plaintiff is a dealer in grain at Minneapolis, and defendant at Triumph, Minnesota. By three telephone communications two carloads of oats and one of corn were sold by defendant to plaintiff in the months of January and February, 1917. The price of each carload was upwards of several hundred dollars. No part of the purchase price was paid, and no part of the grain was ever delivered. On the date of each sale plain-

¹Reported in 182 N. W. 710.

tiff made a written memorandum in triplicate of the parties to the transaction, the property, price and terms, and stating that the memorandum was in confirmation of the telephone communication of that day. One of the triplicates was mailed to defendant on the day it was made. This action is to recover damages for failure to deliver the grain. The complaint alleged the three sales. The answer was a general denial. This made it necessary for plaintiff to prove valid contracts of sale signed by defendant. The learned trial court held the evidence insufficient and dismissed the case when plaintiff rested. This ruling presents the merits of the appeal.

Unless a letter, Exhibit D, written by defendant's manager, James Meehan, to plaintiff under date of April 6, 1917, may be applied to or connected with the three memoranda mentioned, there is no signature by the party to be charged so as to comply with the statute of frauds. The letter reads: "Triumph, Minn. Quinn-Shepherdson Co. Minneapolis, Minn. Gentlemen: On March 16th, when our Elev. was burning you called Mr. Meehan on the phone, and he gave you instructions to buy that grain that you claim he sold you. Did you do so? Please let us hear from you. Yours truly, Farmers Elev. Co." The notations made on this letter by plaintiff upon its receipt, of course, cannot be considered. Nothing connecting with the memoranda may be found in a telegram from defendant on April 9, 1917, reading: "Cannot make any settlement until president gets back." And the same applies to this letter of April 23 to plaintiff: "Gentlemen: We will have a meeting soon and as soon as we will have our meeting we will let you know what we will do, so it is no use of your drawing on us, we cannot do anything until we meet. Yours truly, James Meehan, Mgr. Farmers Elev. Co., Triumph, Minn."

The correspondence of plaintiff in the record adds confusion instead of connecting with the memoranda. Its letters of March 17 and 20 were not answered; that of April 7 related to corn only; that of April 9 stated that plaintiff had sold defendant a carload of corn, and another of the same day stating that it had bought 4,000 bushels of oats for the account of defendant, whereas the memoranda relating to oats was for only 3,500 bushels.

The signature of the party to be charged need not be upon the memorandum of sale, it may be on a separate writing. The rule in that re-

spect is well stated in *Olson v. Sharpless*, 53 Minn. 91, 93, 55 N. W. 125: "Several papers may be taken together to make up the memorandum, providing they refer to one another, or are so connected together, by reference or by internal evidence, that parol testimony is not necessary to establish their connection with the contract." Exhibit D does not connect with the three memoranda by reference or internal evidence. But aside from that, it surely cannot be said that the one who wrote this exhibit signed it intending to evidence a sale, or to acknowledge that any had been made. At most, it acknowledges that plaintiff makes such a claim. It would be perfectly clear that no valid sale could have been established by the production of a letter from defendant, after the telephone communication and receipt of the memoranda, denying that a sale had been made. The writing must indicate that the signature was affixed for the purpose of becoming charged with the obligations of a contract. *Browne*, Statute of Frauds, says in section 357: "The better opinion seems to be that its insertion must also be intended as a final signature." Or else, if the signature relied on is made some time after the verbal sale, the contents of the writing containing the signature must clearly confess or acknowledge that the prior transaction was a sale. The English cases go so far as to hold that a letter admitting that a sale was made, but refusing to be bound thereby, takes the contract out of the statute. *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; *Wilkinson v. Evans*, L. R. 1 C. P. 411; *Leather Cloth Co. v. Hieronimus* L. R. 10 Q. B. Cas. 140. But as above stated Exhibit D does not connect with the memoranda, nor does the signer thereof admit sales to have been made.

Plaintiff cites *Maurin v. Lyon*, 69 Minn. 257, 72 N. W. 72, 65 Am. St. 568, but there the memorandum was signed by the party to be charged, and the question here presented did not arise. *Lenman v. Jones*, 222 U. S. 51, 32 Sup. Ct. 18, 56 L. ed. 89, and *Lewis v. Atlas Mut. Life Ins. Co.* 61 Mo. 534, are not in point. *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. ed. 819, approving the language of Justice Harlan in *Ryan v. United States*, 136 U. S. 68, 83, 10 Sup. Ct. 913, 34 L. ed. 477, merely accords with *Olson v. Sharpless*, *supra*. *Leesley Bros. v. A. Rebori Fruit Co.* 162 Mo. App. 195, 144 S. W. 139, is of no aid here, for the opinion seems to indicate that the memorandum was signed by the party to be charged, and the case hinged on the ability to connect telegrams, fixing a new price, with the property named in the memorandum of sale.

The distinction between the instant case and that of *Albion Lumber Co. v. Lowell*, 20 Cal. App. 782, 130 Pac. 858, 864, is this: Here was no direct admission that defendant had made a sale; there, the seller, 15 days after the making and delivery of the memorandum by the purchaser, wrote and signed a letter seemingly urging the latter to make efforts to come and get the goods and stating: "Have you made any further arrangement in regard to shipping the ties I sold you?" The only transaction between the parties was the sale and purchase of a lot of ties at a certain landing to be shipped and paid for as per the memorandum referred to. There, the admission of a sale was unequivocal and direct. Here, if anything, it can be but an indirect inference from the failure to deny a claim that was being asserted by plaintiff.

We think the ruling dismissing the case was right.

Order affirmed.

CHICAGO GREAT WESTERN RAILROAD COMPANY
v. MINNIE B. ZAHNER, PERSONALLY DOING BUSINESS
AS ZAHNER CHARCOAL COMPANY.¹

April 29, 1921.

No. 22,172.

Amendment of answer denied.

Upon a former appeal in this case a judgment in favor of defendant was reversed. After the going down of the remittitur defendant made an application for leave to file an amended answer in the form of a cross-complaint and for a new trial. The application being denied this appeal was taken. We find no error or abuse of discretion in denying appellant's application.

After the former appeal reported in 145 Minn. 312, 177 N. W. 350, defendant's motion for an order permitting her to amend her answer; and granting her a new trial, and her motion to reconsider said motion and set aside the court's order thereon, was denied, Dickson, J. From the orders denying these motions, defendant appealed. Affirmed.

Norton & Norton, for appellant.

Briggs, Weyl & Briggs, for respondent.

¹Reported in 182 N. W. 904.

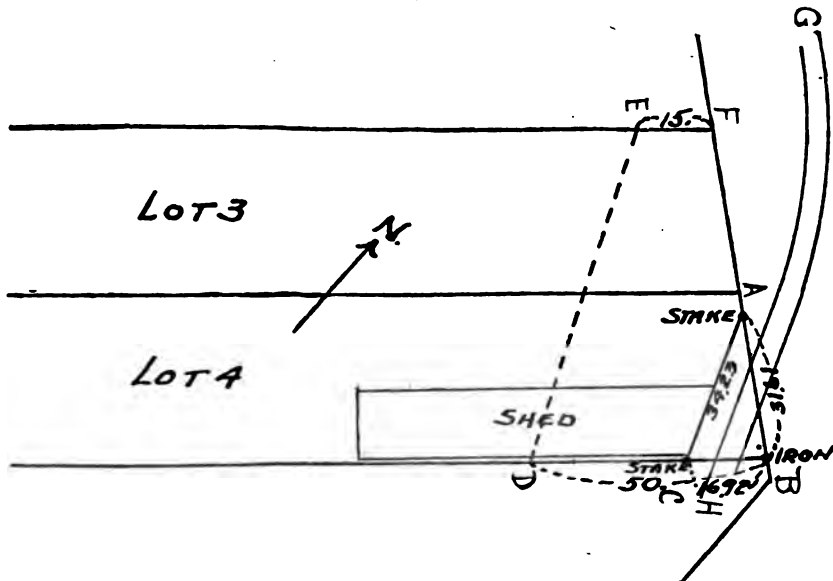
QUINN, J.

Action in ejectment to recover possession of the parcel of land described in the complaint. The cause was tried to the district court of Ramsey county. Evidence was taken, findings made and judgment entered in favor of defendant. There was an appeal by plaintiff to this court and it was held that the deed referred to in the pleadings conveyed only a railroad right of way easement and not the fee, and that under such deed the railroad company is entitled to the exclusive possession of the right of way easement, and that it may recover possession without showing that it has immediate need of the portion occupied by the owner of the servient estate for railway purposes, or that such occupancy disturbs its enjoyment thereof for railway purposes, and the judgment was reversed. An application for a rehearing was made by defendant, and in disposing of the same it was said: That "if the defendant * * * is entitled to relief in this action because of any fact not appearing in the record now before the court or not pleaded, she can apply to the trial court upon the going down of the remittitur." 145 Minn. 312, 319, 177 N. W. 350.

The defendant, in conformity with the suggestion, applied to the trial court, upon notice, for leave to serve and file an amended answer in the nature of a cross-complaint, and for a new trial as to the issues thus presented. The proposed pleading contained a general denial, admitted defendant's possession of the property in controversy, and affirmatively pleaded mutual mistake as to the amount and description of the property conveyed by the Secombe deed, and asked for a reformation thereof on the ground of such mutual mistake, so as to make the deed conform with the agreement and intention of the parties thereto. The motion for leave to amend and for a new trial was denied, and this appeal followed.

The plaintiff makes no claim to the right of possession except through the warranty deed from Secombe which was executed in March, 1905. This deed, in addition to the description, contained the following: "Such portions of lots 3 and 4 being deemed necessary to be used for a track contemplated and to be laid by said Chicago Great Western Railway Company on said land for commercial purposes."

A diagram of the situation showing substantially the tract (BDEF) conveyed by the deed, and also the triangle (ABC) crossed by the side-track, as well as the location of the track follows:



On the former appeal judgment in favor of the defendant was reversed without any direction as to what further proceeding should be had. The effect of the reversal of a judgment depends upon the ground upon which it is based, as expressed in the decision reversing it. *Jordan v. Humphrey*, 32 Minn. 522, 21 N. W. 713; *National Inv. Co. v. National S. L. & B. Assn.* 51 Minn. 198, 53 N. W. 546. By the reversal of the judgment in the present case, the findings of the trial court, its conclusions of law and order for judgment were all set aside. As the case then stood, under the holding of this court as expressed in its opinion, the plaintiff was entitled to judgment, unless the trial court in its discretion saw fit to grant defendant's application for leave to amend the answer and for a new trial of the issues thus presented.

It is desirable that litigants so frame the issues in their pleadings that all contentions may be tried out in one trial, but counsel are not always sufficiently informed of the facts, by their clients, to enable them to bring about such results. The issues presented by the pleadings herein were fully considered and disposed of in the former decision. The granting of leave to serve and file an amended answer was for the trial court. The order denying the same under the circumstances then existing, was not appealable under the well established rule of practice. *Hanley v. Board*

of Co. Commrs. of Cass County, 87 Minn. 209, 91 N. W. 756; Stromme v. Rieck, 110 Minn. 472, 125 N. W. 1021; Itasca Cedar & Tie Co. v. McKinley, 129 Minn. 536, 152 N. W. 653; Blied v. Barnard, 130 Minn. 534, 153 N. W. 305.

Plaintiff's grantor remained in possession and use of all the tract conveyed to plaintiff, except the triangle crossed by the sidetrack as shown above, until in April, 1911, when he sold and conveyed all of lots 3 and 4 to the defendant by warranty deed subject only to the easement referred to. The defendant went into immediate possession and has since remained in possession thereof, using the same in connection with the trackage facilities afforded by such sidetrack. While the result in this case leaves the defendant's possessions some 40 feet distant from the sidetrack, which was constructed for the special accommodation of lots 3 and 4, yet, under the circumstances now existing, her remedy is with another tribunal, as was suggested in the former opinion. A new trial without an amendment of the pleading would avail defendant nothing. We find no error or abuse of discretion in the record, either as to refusing leave to amend or in refusing a new trial.

Affirmed.

STRONGE & WARNER COMPANY v. H. CHOATE
& COMPANY.¹

April 29, 1921.

Nos. 22,206, 22,210.

Relief for breach of contract limited — injunction — damages.

Plaintiff was conducting a retail millinery business in defendant's dry-goods department store, under a contract which provided that plaintiff should conduct its department with the same degree of refinement and energy as the other departments in the store were conducted. Plaintiff's business was conducted ostensibly as if owned by defendant. On learning that plaintiff was to open a similar business in a competing department store, defendant gave notice that its contract with plaintiff would terminate before its expiration. Plaintiff sued to restrain defendant from so doing and for damages. Before trial plaintiff removed because of defendant's interference. From the judgment awarding damages until the commencement of suit, and restoring possession, both parties appeal. It is *held*:

¹Reported in 182 N. W. 712.

(1) The nature of the contract and the facts were such that, if plaintiff was entitled to any relief at all, it should have been limited to compensation in damages.

(2) The finding that plaintiff had failed to perform a substantial part of the contract precluded a court of equity from granting relief.

(3) In the absence of the finding mentioned, plaintiff would have been entitled to recover under the allegations of the complaint for the loss of profits during the whole time that it was deprived of doing business under the contract.

(4) The evidence did not show the contract to have been procured by fraud or collusion so as to justify a denial of relief.

(5) Neither the contract, nor plaintiff's manner of doing business, nor the entry of a like contract with defendant's competitor were in violation of sections 8595, 8903, 8973 or 8974, G. S. 1913.

(6) The record fails to show that, either in obtaining the contracts under which plaintiff did business or in its conduct thereof, there was an unlawful plan to stifle competition or to fix prices or to combine to defraud or mislead the public.

Action in the district court for Winona county for restoration of rights under a certain contract, for a permanent injunction restraining defendant from continuing a millinery establishment other than one managed and conducted by plaintiff, as in said contract provided, and for \$5,800 damages. The case was tried before Childress, J., who made findings. Plaintiff's motion for amended findings and conclusions of law was granted in part and defendant's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed on the ground that the award of damages was insufficient, and defendant appealed from the whole judgment. Reversed.

Webber, George & Owen, for Stronge & Warner Co.

Brown, Abbott & Somsen and *E. V. Knauf*, for H. Choate & Co.

HOLT, J.

Both parties are corporations engaged in the mercantile business. Plaintiff, besides conducting a wholesale millinery establishment at St. Paul, Minnesota, also makes contracts with so-called department stores in the larger cities of this and other states, whereby it carries on a retail millinery business as a department in such stores and ostensibly in their names. Defendant has for a long time owned and operated a high class dry goods department store at Winona, Minnesota, and, for the last 12 years, plaintiff has had a retail millinery department therein, occupying

a part of the ground floor. This business has run in the name of defendant under written agreements renewed from time to time, the last one being executed in December, 1918, to run until December 31, 1921. Plaintiff is termed lessee and defendant lessor, but an attentive examination of the instrument discloses that it is not the conventional lease. It is more in the nature of a contract under which business is to be carried on for the mutual advantage of the parties. After stating that the contract shall run for three years beginning January 1, 1919, and terminate December 31, 1921, it reads:

"That the lessee agrees to conduct a millinery department in the space now occupied as such and conduct and maintain with the same degree of refinement and energy as the other departments in the same building and to pay to lessor a rental of One Hundred and Twenty-five (\$125.00) Dollars per month and in addition thereto five (5%) on the net credit sales as O. K.'d by lessor.

"That lessor agrees during the time of this lease to conduct and maintain the same general business in the same general volume as is being conducted at the present time.

"That all receipts of cash and credits shall be turned into the office of lessor as is done in the regular order of business.

"That lessor agrees to furnish lessee a monthly statement showing all cash and credit sales, expense items, such as clerk hire, express and other incidentals paid out for lessee as authorized by lessee, and mail to lessee check for the difference between the expense of the department and the sales, it being understood that lessor shall include among the expenses its rent of One Hundred and Twenty-five (\$125.00) Dollars per month, as related above.

"That lessee shall make contracts for help in said department and salaries to be charged to lessee." [A paragraph relating to show cases and fixtures omitted.]

"That lessor shall furnish free of further charge to lessee sufficient light, heat, delivery service and other service as is furnished by the store at the present time. All other expenses pertaining to the department, such as merchandise, insurance, taxes, salaries, freight and express, etc. shall be paid by lessee.

"That lessee shall have the exclusive use of the west window of the east part of the building, except at such times as when hats are displayed

on other windows, or in case of a change of the front of the store by lessor, lessor may change the above assigned show window space to some other equally large and favorably located show window space."

Friction arose, and when, in the latter part of July, 1919, defendant learned that plaintiff had entered a similar contract with a rival department store, the Interstate Mercantile Company, located a block from defendant's store, plaintiff was notified that its contract would be terminated on August 1, 1919. On and after that date defendant let another millinery retail dealer into the space occupied by plaintiff and so interfered that doing business there became impossible for plaintiff, and it removed its goods. Before so removing, and on or about August 5, this action was instituted by plaintiff to be restored to its rights, to enjoin defendant from conducting a millinery establishment in the store other than one conducted by plaintiff under its contract, and for \$5,800 damages. The defendant answered that plaintiff had breached the contract by failing to conduct its business as agreed to, and that the contract with plaintiff was entered with the understanding that it should not involve defendant in any transaction that might appear to be in restraint of trade, or to fix prices, or to limit competition, but that, by entering a similar contract with the Interstate company, there necessarily resulted a restraint of trade, a limitation of competition and a fraud on the public. The trial resulted in findings awarding plaintiff \$100 damages and restoration to its rights under the contract. From the judgment entered, both parties appeal, plaintiff's appeal being limited to the inadequacy of the damages.

There is no serious dispute as to the material facts. The court found "that during the year 1919 said plaintiff did not conduct said millinery department in said defendant's store with the same degree of refinement and energy as the other departments in said defendant's store were conducted." This finding is not assailed, and the evidence amply sustains it. It was also found that defendant wrongfully "evicted" plaintiff; that the eviction "was not malicious, but was the result of the advice of counsel," and that plaintiff sustained damages "up to the time this action was commenced by reason of said eviction in the sum of \$100."

Amended findings were also made to the effect that, under plaintiff's contracts, its millinery retail business is conducted and advertised as a department belonging to the store or establishment where it is located;

that during the whole time of plaintiff's connection with defendant the retail millinery department has ostensibly been carried on as the business of defendant, and plaintiff has profited from the good business reputation and good will possessed by defendant; that the Interstate Mercantile Company also has an extensive trade in the same lines and the same territory as defendant, and for many years has maintained a retail millinery department in its store; that these two department stores enjoyed "a large portion of the trade in the goods sold by them including most of the millinery trade of said city," which, however, up to August 1, 1919, had been owned and operated by the two different parties; that, without the knowledge or consent of defendant, a contract was made between plaintiff and the Interstate Mercantile Company similar to the one with defendant, and under which plaintiff since the last named date has carried on a retail millinery department in the Interstate company's store and ostensibly in its name; that when defendant learned of the last mentioned contract, and on or about July 26, 1919, it notified plaintiff that it would and did on August 1, 1919, terminate all contract relations with plaintiff and repossessed itself of the premises let to plaintiff; and that the millinery business of plaintiff in defendant's store from the fall of 1917 to August 1, 1919, returned a net profit of \$3,000.

The case was tried seven months after the so-called eviction. Meanwhile a third party had become established in the business plaintiff had had in defendant's store. Unless damages will not afford adequate relief, equity should hesitate to destroy the business of this third party, even were plaintiff entitled to restoration. Whatever injury plaintiff suffered from the termination of the contract, is now beyond repair or recoupment by any attempt to again open its business with defendant, for there remain but a few months of the term. In *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633, where the landlord by constructing an addition to the building obstructed entirely the view and light of a tenant's rooms, the court refused a mandatory injunction after the addition wall had been constructed, holding that, in view of the early termination of the lease, the remedy for the wrong should be confined to compensation. There, as here, the trial court had refused an injunction pendente lite.

But there are other reasons why the judgment reinstating plaintiff in

defendant's store is wrong. As before suggested, when the terms of the contract are considered, it clearly appears that, notwithstanding the use of the terms lessor, lessee and rent, we have not the ordinary lease of real estate or of rooms or space in a building. It is more in the nature of an arrangement whereby their businesses as to place and certain operating expenses are joined for mutual advantage. It may safely be asserted that neither contemplated that in case of a breach of the contract the court would compel them to continue the relation. Such compulsion, after the parties had come to an open rupture, could hardly fail to be extremely embarrassing and financially detrimental to both. The conditions under which business was to be conducted necessitated friendly co-operation to achieve success. We therefore think the court should not compel specific performance, but give damages if any relief at all was warranted.

Again, as the findings now stand, we cannot see how the judgment could go in favor of plaintiff either for restitution or damages for lost profits. Defendant agreed to conduct and maintain the same general business and volume of business as when the contract was made, and plaintiff agreed to conduct the millinery department "with the same degree of refinement and energy as the other departments" in the store. It is readily seen that these provisions are vital terms of the contract to be mutually kept and performed by the parties in order to make the most of their business arrangement. The conduct of plaintiff's department would reflect on that of the business of other departments in the store and vice versa. The specific finding of plaintiff's nonperformance or violation of the term mentioned ought to bar any relief.

In *Ashe-Carson Co. v. Bonifay*, 147 Ala. 376, 41 South. 816, the syllabus is: "The complainants having violated the terms of the lease by boxing trees under 10 inches at the butt, they were not entitled to relief in equity under the contract of lease against the lessors for their alleged trespass in cutting and hauling away boxed trees for lumber." The opinion refers to the maxims that he who seeks equity must do equity, and he who comes into equity must come with clean hands, and cites from 1 Pomeroy, *Eq. Jur.* (2d ed.) §§ 397, 399: "Whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable prin-

ciple, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." See also note 4 A. L. R. 73; *Montana Water Co. v. Billings*, 214 Fed. 121; *Robson v. Bohn*, 22 Minn. 410; *Karbach v. Grant*, 131 Minn. 269, 154 N. W. 1071. We think defendant when sued may assert this defense, although not given as the cause for terminating the contract.

Even were the contract held to create a partnership, a continuance of the relationship should not be compelled in view of the finding referred to, were we inclined to adopt the line of decisions holding that equity will, under certain conditions, interpose for that purpose. The two opposing views on this proposition are well stated and authorities cited in *Karrick v. Hannaman*, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. ed. 484. See, also, 19 Eng. Rul. Cas. 615.

The foregoing conclusions lead to a reversal of the judgment on defendant's appeal but since the findings of fact are somewhat inconsistent, and at variance with the conclusions of law, it is thought better to direct a new trial than a modification of the findings and judgment. And to that end some questions raised by the appeal, and which will doubtless arise on a new trial, must be decided.

Had the court not found plaintiff guilty of violating a material provision of the contract, damages for defendant's breach should have been awarded. These were not limited to those sustained between the breach and the commencement of the action, but should have included all damages resulting from being deprived of the benefits of the contract for the unexpired term. *Kalkhoff v. Nelson*, 60 Minn. 284, 62 N. W. 332. The amended complaint is sufficient to let in proof of the loss of net profits. Plaintiff had an established business and net profits were susceptible of satisfactory proof under the doctrine of *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847.

Defendant contends that the contract was obtained by fraud and collusion, and, since defendant was not aware of this until disclosed during the trial, it is available as a defense without being pleaded and without having been given as the cause for ending the contract. In *Primeau v. Grandfeld*, 193 Fed. 911, 114 C. C. A. 549, it is said: "When fraud or illegality is disclosed in a case, public policy requires a court to refuse

its aid irrespective of the state of the pleadings and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief." The doctrine has no application here, for the record discloses no fraud practiced on defendant. For years the parties had carried on business together and defendant was not averse to continue the same when the present contract was made. That defendant's manager, who took part in making the contract, was hostile to plaintiff and induced the latter to make a peace offering, by discounting a claim it held against him personally, did not serve to make this contract void or voidable, for defendant's president, and not its manager, was the one who ultimately determined the terms of the contract and executed it without any urging or inducement from the manager or any one else.

There is an earnest contention that doing business as contemplated by this contract is unlawful, and clearly so when done by the same party in two competing houses. It is said to offend sections 8595, 8903, 8973, 8974, G. S. 1913, and to work a fraud on the public. We discern no violation of any statute in the terms of the contract, or in the manner in which plaintiff conducted its retail trade. The first section named covers conspiracies to commit an act injurious to public morals, trade or commerce. There surely was no such conspiracy proven. An intention to require sales advertisements to disclose the true owner or seller of the merchandise offered cannot well be ascribed to section 8903. It is aimed rather at misrepresentations of the goods advertised. No claim is made that the name of either plaintiff, or defendant or the Interstate Company, or any other local milliner gave the style, quality or standing to any millinery creation offered for sale by any advertisements in Winona. Nor is any combination or pool agreement to be found in plaintiff's method of doing business under the contract or anything which tends in restraint of trade, or of price fixing or of stifling competition within the prohibition of sections 8973, 8974 as the same, when embodied in chapter 359, p. 487, Laws 1899, were construed in the exhaustive opinion in *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 23 L.R.A.(N.S.) 1260.

But, irrespective of the statutes, it is urged that plaintiff's method of doing business is a fraud on the public and courts should lend it no aid. The Interstate Mercantile Company and defendant are competi-

tors in the same field. The public so understands. And it is claimed that plaintiff has taken undue advantage of this situation by operating a noncompetitive department in each store in the name of the store, thus misleading the public to patronize plaintiff under the belief that actual competition exists between the millinery departments in the two stores. The contracts under which plaintiff operates are said to be against public policy. Plaintiff's methods may not be the most ethical. And it may be that the retail millinery business is so susceptible of imposing on the public that those conducting it ought to hoist "the black flag of piracy," as counsel assert, in every city where one party conducts more than one establishment under different names. But we apprehend competition and price are not great factors with the women when the seasons for change of hats arrive. However that may be, the practice for persons of limited capital or special qualifications in certain lines of trade, requiring but little room for operation, to procure space in a large mercantile establishment wherein to operate under some agreement with the establishment and in its name, has become so general in our large cities that courts should hesitate to brand it unlawful, unless there is evidence that evil has resulted in the particular case wherein the practice is assailed. An accepted general business usage is itself strong evidence as to what is in accord with public policy is an observation made in *Alair v. Northern Pacific R. Co.* 53 Minn. 160, 54 N. W. 1072, 19 L.R.A. 764, 39 Am. St. 588.

We do not sustain the proposition that this record shows plaintiff's manner of doing a retail millinery business in defendant's name or store, or in both its and that of the Interstate company's to have been unlawful or a legal fraud on the public. The obtaining of the one or both of these contracts cannot be construed as an attempt to stifle competition, or fix prices, or as an unlawful combination. *Fairbank v. Leary*, 40 Wis. 637, cited by defendant, does not sustain its contention, for the contract was held to show no illegality on its face, and it certainly was more susceptible of being construed as designed for wrongful purposes than the one here involved, and this record contains no proof that any of the parties concerned were "in secret league" to affect the market. The burden was on defendant to show the business conducted under the contracts in question to be against public policy. "It must not be forgotten that the

right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare." *Baltimore & Ohio S. W. Ry. Co. v. Voight*, 176 U. S. 498, 20 Sup. Ct. 385, 44 L. ed. 560.

The judgment is reversed and a new trial directed.

MATHILDA ERNSTER v. ANNA ELTGROTH.¹

April 29, 1921.

No. 22,237.

Slander — chastity of unmarried woman.

1. Words charging an unmarried woman with incontinence are actionable per se, even when no special damages are pleaded.

Same.

2. To render words actionable per se, in an action for slander, it is not necessary that they bear a criminal import. If, in their ordinary acceptance, the words spoken would naturally and presumably be understood as importing a charge of crime, they are prima facie actionable.

Action in the district court for Houston county to recover \$20,000 for slander. Defendant demurred to the complaint on the ground that it did not set forth facts sufficient to constitute a cause of action. The demurrer was overruled, Catherwood, J. From the order overruling the demurrer, defendant appealed. Affirmed.

Morris J. Owen and *Lees & Bunge*, for appellant.

Hopp & Larson and *William E. Flynn*, for respondent.

QUINN, J.

This is an action for slander. Defendant demurred to the complaint

¹Reported in 182 N. W. 709.

and the demurrer was overruled. The sole question presented is whether the complaint states a cause of action. No special damages are pleaded.

The pleading sets forth that plaintiff is an unmarried woman, 20 years of age, of chaste character and living at home with her parents; that defendant is a married woman and the wife of Nick Eltgroth; that in the presence of a number of persons defendant said of and to the plaintiff, the words as charged, which are fully set forth in the pleading. Courts will understand and construe such language as ordinary men naturally understand such words. Language need not necessarily bear a criminal import, in order to render it actionable *per se*. The test is whether, in the ordinary acceptance of the language, a person could reasonably doubt its signification. It is not necessary that the words should make the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime. *Stroebel v. Whitney*, 31 Minn. 384, 18 N. W. 98. We think the language charged in this case strongly imports a charge of incontinence. Such language is seldom used even by the most vulgar and obscene. It can hardly be conceived how it could be considered in any other sense. As said in *Reitan v. Goebel*, 33 Minn. 151, 22 N. W. 291, the ground for an action for words, in the absence of special damage, is the immediate and natural tendency of the words themselves to produce injury to the person of whom they are spoken. The least that can be said of the charge, if believed, is that it directly indicated a total disregard of chastity and common decency, and must naturally excite the contempt and reprehension of all. The sufficiency of the pleading demurred to cannot be successfully assailed under the rule adopted in this state.

It is hardly conceivable that a young unmarried woman, 20 years of age, could in such direct and grossly vulgar language solicit a married man to have such intimate relations with her, unless she was given to indiscriminate illicit relations with men. It is alleged that the words used were understood by those hearing the same, as imputing unchastity and incontinence to plaintiff, and that she was thereby injured and damaged in her good name and reputation.

Affirmed.

STATE v. HENRY MORRIS.¹

May 6, 1921.

No. 22,022.

Criminal law — corroboration of accomplice — conviction sustained.

1. The evidence referred to in the opinion satisfied the requirements of section 8463, G. S. 1913, relating to the corroboration of an accomplice, and justified the jury in returning a verdict of guilty.

Indictment for grand larceny — conviction for petit larceny.

2. A defendant indicted for grand larceny in the second degree cannot complain because the court permitted the jury to find him guilty of petit larceny, although the evidence strongly tended to show that, if guilty at all, he was guilty of the crime charged.

Charge to jury — request for instruction.

3. If the evidence permits of no doubt as to the degree of the crime, the court may properly instruct the jury either to convict of the crime charged or to acquit, but the defendant should request such an instruction if he desires to waive the benefit of G. S. 1913, §§ 8476, 9213.

Exclusion of negative evidence of reputation.

4. If a witness has known the defendant long enough and under such circumstances that he would be likely to have heard remarks derogatory to his character if they had been made, he may give evidence negative in form as to defendant's reputation. Defendant was not prejudiced by the exclusion of such evidence after he was allowed to introduce a large amount of character evidence.

Rulings on evidence.

5. There was no error in rulings excluding certain evidence offered by defendant, or in the court's instructions to the jury.

Defendant was indicted by the grand jury of Olmsted county charged with the crime of grand larceny in the second degree, tried in the district court for that county before Callaghan, J., and a jury, and found guilty of petit larceny. When the state rested, defendant's motion for a direct-

¹Reported in 182 N. W. 721.

ed verdict and his motion to dismiss the action were denied. Defendant's motion for judgment notwithstanding the verdict or for a new trial, was denied. From the judgment entered pursuant to the verdict and sentence, defendant appealed. Affirmed.

Frazer & Frazer, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *Oscar C. Ronken*, County Attorney, for respondent.

LEES, C.

Defendant was indicted on a charge of grand larceny in the second degree. The jury found him guilty of petit larceny, and he has appealed from the judgment rendered upon his conviction.

The proof of guilt consisted largely of the testimony of one Delitzo, a confessed accomplice. In substance his testimony was that in July, 1919, while he was employed by the Kahler-Roberts Company at the Colonial Hotel in the city of Rochester, he took a sack of flour, a sack of coffee and one of sugar, of the value of \$22.06, all belonging to the company, and set the sacks on a porch or in an outside hallway of the hotel, in order that defendant might get them; that he did this by prearrangement with defendant, who later in the day and after dark took the property to his house adjoining the hotel and subsequently paid the witness \$15; that the flour was in the sack in which it came from the mill, and that before he set it out he enclosed it in a gunny sack so he would not get his clothing white with flour. He also testified that during the month of July he set out for defendant in a similar manner other supplies from the hotel. He admitted that he had been arrested on a criminal charge based on his part in these transactions and had pleaded guilty and paid a fine.

1. Defendant's first contention is that there was no corroborating evidence sufficient to satisfy the requirements of G. S. 1913, § 8463. The state finds such evidence in the following circumstances: During the night of August 2, 1919, a police officer and the manager of the hotel went to defendant's house with a search warrant, got defendant out of bed and proceeded to search the premises. They found a sack of flour inside a gunny sack, part of a sack of coffee, a sack of sugar and other

supplies of the kind Delitzo testified he had set out for the defendant. The goods found and claimed by the manager of the hotel made two loads for the patrol wagon in which they were taken away. Some of the goods were found in a wall case in the room occupied by defendant as a bedroom, and some were found in a basement room with a lot of kindling wood and rubbish. A number of dishes of the same pattern as those used in the hotel were among the articles found and taken away. The manager of the hotel testified that some of the goods were the same brand and in containers similar to those in which such articles were purchased for the hotel; that, when he asked defendant where he got the goods, he said they were in his house when he bought it and that he found them under the woodpile in the basement. When asked for a further explanation, he replied, "I won't talk any more."

Defendant testified that in July, while cleaning out the basement of his house, he found the dishes referred to under the rubbish, and that he did not see the flour, coffee, sugar and other articles until the police officer found them when the search was made. He was unable to account for their presence in his room, and insisted that he was too surprised for words when the officer discovered them there. At the time of the search he was conducting a boarding and lodging house located on premises adjacent to the hotel and bought and kept in it the groceries and supplies usually kept in such places.

The rule relating to corroboration of an accomplice has been too often stated to be repeated here. 1 Dunnell, Minn. Dig. § 2457; State v. Christianson, 131 Minn. 276, 154 N. W. 1095; State v. Lyons, 144 Minn. 348, 175 N. W. 689. We are of the opinion that, within the rule, Delitzo's testimony was sufficiently corroborated by the testimony of the police officer, the hotel manager, and the defendant's own statements, and also by facts and circumstances surrounding the discovery of the property in his house.

2. Delitzo's testimony, supplemented by the other evidence to which reference has been made, would justify the jury in finding the defendant guilty of larceny. We have not overlooked the evidence of trouble between defendant and his wife and Delitzo's alleged intimacy with the wife, the inability of the hotel manager positively to identify the goods as the property of the Kahler-Roberts Company, and the evidence of

good character introduced by defendant. These were proper considerations to urge upon the jury, but were not of sufficient weight to require a verdict of acquittal.

3. Complaint is made because defendant was found guilty of petit larceny. It is urged that he is either innocent or guilty as charged in the indictment. We have no doubt that the evidence would have sustained a conviction of grand larceny in the second degree. Defendant's counsel are right in asserting that if the evidence is such that there can be no doubt as to the degree of the crime, if the accused is guilty at all, the court may properly instruct the jury that they must either convict of the crime charged or acquit. *State v. Nelson*, 91 Minn. 143, 97 N. W. 652; *State v. Potoniec*, 117 Minn. 80, 134 N. W. 305. Defendant cannot complain, however, because the jury concluded that he took the property under circumstances not requiring them to find him guilty of larceny in a higher degree. The act for which defendant was indicted was the same as that for which he was convicted, and a conviction of a lesser degree was, therefore, proper. *State v. Staples*, 126 Minn. 396, 148 N. W. 283.

In an early American case, *State v. Bennett*, 2 Tread. (S. C.) 693, it was said that however absurd it may appear that a jury sworn to determine a case according to the evidence should be authorized to find the goods stolen of less value than all the witnesses swore they were worth, it is what Blackstone calls a "pious perjury" which the jury has been indulged in until it has become the law of the land. In *Bryant v. State*, 158 Ala. 26, 48 South. 543, the proof showed without conflict that the goods stolen were of a value which made the offense grand larceny, yet the accused was convicted of petit larceny, and the verdict was allowed to stand on the theory that he was not harmed by and could not complain of a conviction of a lesser grade of the offense than the evidence would have sustained. Under our statutes and decisions such a conviction is a bar to a subsequent prosecution for a greater offense. *G. S.* 1913, § 9194; *State v. Wiles*, 26 Minn. 381, 4 N. W. 615; *State v. Hackett*, 47 Minn. 425, 50 N. W. 472, 28 Am. St. 380. The commission of petit larceny is necessarily included in grand larceny. Each of the several descriptions of larceny involves a simple larceny. The fact of its having been committed in a building merely aggravates the offense and increases

the severity of the punishment. G. S. 1913, §§ 8476, 9213; *State v. Eno*, 8 Minn. 190 (220); *State v. Vadnais*, 21 Minn. 382; *State v. Wiles*, *supra*; *State v. Snyder*, 113 Minn. 244, 129 N. W. 375; *State v. Wondra*, 114 Minn. 457, 131 N. W. 496; *State v. Levine*, 146 Minn. 187, 178 N. W. 491. If the evidence is such that a jury may convict of a lesser degree of the offense charged, the accused is entitled to an instruction submitting the lesser degree. *State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Brinkman*, 145 Minn. 18, 175 N. W. 1006. If, on the other hand, the accused desires to relinquish his chance of escaping with a conviction of a lesser offense in the hope that the jury will refuse to convict him of a greater, he should request the court to instruct that the only permissible verdicts are guilty as charged or not guilty, and no such request was made here.

4. A witness, who is shown to have been acquainted with the accused for a considerable time under circumstances that he would be likely to have heard anything said against him, may testify that he never heard any remark against his character. *State v. Lee*, 22 Minn. 407, 21 Am. Rep. 769. Defendant contends that the trial court erroneously excluded evidence of this sort and that prejudice to his substantial rights resulted therefrom. The rule may have been infringed when objections were sustained to certain questions put to some of the character witnesses. Many character witnesses were called and most of them were permitted to cover that field of evidence thoroughly. If the court was too strict in some of its rulings, the error was without prejudice in view of the great amount of such evidence that was received. *State v. Crawford*, 96 Minn. 95-102, 104 N. W. 768, 822, 1 L.R.A.(N.S.) 839.

5. We find no error in the refusal to allow defendant to go into the history of his troubles with his wife. That was a matter wholly collateral to the issue on trial. Neither do we find error in the admission of Delitzo's testimony that he took articles belonging to the Kahler-Roberts Company in addition to those described in the indictment which were also found in defendant's house. *State v. Monroe*, 142 Minn. 394, 172 N. W. 313; *State v. Ettenberg*, 145 Minn. 39, 176 N. W. 171.

6. The court's instructions to the jury were clear and comprehensive and were eminently fair to the defendant, and we find no ground for criticism of them. The charge included all the good law there was in

defendant's requested instructions, and there was no error in refusing to state it in the identical language in which the requests were framed. The instructions relating to the effect of evidence of good character were similar to those approved in *State v. Ames*, 90 Minn. 183, 96 N. W. 330.

The other assignments of error have been considered, but it is unnecessary to discuss them.

The judgment is affirmed.

H. O. TORGERSON AND ANOTHER v. N. H. OHNSTAD.¹

May 6, 1921.

No. 22,117.

Negotiable instrument — notice of dishonor to indorser.

1. Where the holder of a negotiable instrument presents it to the maker for payment, the presentation and demand being in all respects in full compliance with the law, and payment is refused and the instrument thus dishonored, to fix and continue the liability of an indorser notice of the dishonor must be given within the time fixed by the negotiable instruments act, in default of which the indorser will be discharged.

Omission to give notice of dishonor not excused.

2. Where the presentation and demand conforms in all respects to the statutory requirements, and the refusal of the maker to pay is thus brought home to the holder, his failure to notify the indorser cannot be excused on the theory or claim that a formal presentation and demand, though in fact made, was not intended.

Omission to give notice of dishonor not overcome by later notice.

3. The failure to give the notice discharges the indorser and a subsequent presentation and demand for payment, attended with the same formalities some six months later, followed by proper notice to the indorser, will not revive his liability.

Action in the district court for Steele county to recover \$1,100 upon a promissory note. The amended answer alleged that without defendant's knowledge or consent plaintiffs released their right to collect the

¹Reported in 182 N. W. 724.

note out of the assets of the Ellendale Mercantile Company. The case was tried before Childress, J., who when plaintiffs rested denied defendant's motion to dismiss the action and at the close of the testimony denied his motion for a directed verdict, and a jury which returned a verdict for \$1,342. From an order directing judgment in favor of defendant notwithstanding the verdict, plaintiffs appealed. Affirmed.

F. A. Alexander and Arclander & Nordbye, for appellants.

Moonan & Moonan, for respondent.

BROWN, C. J.

Action to recover against defendant as an indorser of a promissory note. Plaintiffs had a verdict which was set aside and judgment ordered for defendant. Plaintiffs appealed.

It appears that the note in suit was given to defendant for a loan of \$1,100 to the makers, who were mercantile dealers in the village of Ellendale, in Steele county, this state. Plaintiffs were engaged in automobile repair work in the same place, as was one Carl Aronson also. Plaintiffs desired to dispose of their business and negotiations with Aronson resulted in a sale thereof to him. Aronson is the son-in-law of defendant. He was in need of funds to complete the transaction and applied to defendant for financial help. The purchase price of the property, which included stock in trade, tools and automobile accessories, and a town lot and the building in which plaintiffs had carried on the business, was \$2,500. This was furnished by defendant. As a part thereof he indorsed the note in suit, then past due, and turned it in at its face value.

Under the Uniform Negotiable Instruments Act, the note, though overdue when so indorsed and transferred, became, as to the parties concerned in the particular transaction, payable on demand, and it was incumbent upon plaintiffs as indorseees, to charge defendant with continued liability as indorser, to demand payment of the makers within a reasonable time, and, if not paid, to give notice thereof to defendant within the time fixed by that act. G. S. 1913, §§ 5819, 5883 and 5926. The only question involved on the appeal is whether there was a compliance with the statute. The trial court submitted the question to the jury and the general verdict for plaintiffs was an affirmative answer, based on

the facts and rules of law laid down for their guidance by the court's instructions. On subsequent consideration of the question, on defendant's motion for judgment notwithstanding the verdict or a new trial, the court concluded that the evidence was conclusive that the statute had not been complied with and judgment notwithstanding the verdict was ordered for defendant. Plaintiffs insist that there was a proper presentation and demand of payment and notice of dishonor, and that the court below was in error in holding otherwise.

The facts are not in material dispute, though the conclusion to be drawn therefrom forms the essence and substance of the case. The transaction as a result of which the note was indorsed and transferred to plaintiffs took place on November 6, 1916. Plaintiffs' automobile repair shop was then transferred to Aronson and the purchase price paid over to them in the manner stated. Two days later, November 8, plaintiffs formally presented the note to the makers at their place of business and demanded payment, and payment was refused on the ground that they were not able to make payment at that time. They, however, then stated to the member of plaintiffs' firm who presented the note that they were in the hope of selling out their mercantile business soon, and if a sale was made they would be in funds and able to pay. No notice of this presentation and dishonor was given to defendant during the next succeeding day, as required by the negotiable instruments act, or at all. Thereafter in May, 1917, some six months from the date of the transfer of the note to plaintiffs, and after the makers had turned their property over to a trustee for the benefit of their creditors, they again presented it with a demand for payment, which was refused, this time for the total lack of funds. This was followed by a proper notice to defendant.

An indispensable element of a cause of action against the indorser of a negotiable instrument, is notice of its dishonor by the maker, given by the holder in the manner and within the time prescribed by law. The right of action does not accrue until the notice is given, and the failure to give it cannot be excused, except perhaps for special reasons not here presented. The requirements of the law are unyielding in this respect. 3 R. C. L. 1218, and citations in notes §§ 440 and 446. The note in suit was dishonored by the makers on November 8, 1916, but no notice thereof was given to defendant. This discharged the defendant and ends the

case, unless we are required by the record to sustain the contention that the presentation and demand of payment on November 8 was not intended as a formal presentation, or as a compliance with the requirements of the law on the subject, but rather as informal and merely "sounding out the makers," therefore not of legal significance or effect. But the record does not sustain that contention. The evidence, presented by plaintiffs in their case in chief, shows beyond dispute an intentional presentation of the note to the makers and a demand of payment, which was in full compliance with the essentials prescribed by the negotiable instruments act. It shows also a refusal of payment, coupled with the statement that the makers expected to sell their property and would then be able to pay. The suggestion that plaintiffs did not intend this as a formal presentation is without force, since the evidence conclusively shows to the contrary. The failure to give notice cannot be excused on the theory that the refusal to pay the note came to plaintiffs in an "informal" way, nor by a showing that defendant was in no way injured or prejudiced by their default. *Rosson v. Carroll*, 90 Tenn. 90, 16 S. W. 66, 12 L.R.A. 727; 3 R. C. L. 1218, §§ 440, 446, 459, and 8 C. J. 545, § 757, and citations. Defendant was discharged from further liability, and the subsequent second presentation followed by a proper notice, though in conformity with a local custom as to time, did not revive the original liability. *Rosson v. Carroll*, *supra*. The learned trial court therefore properly ordered judgment for defendant notwithstanding the verdict, and the order so directing must be affirmed.

Order affirmed.

**BILL GRUBERSKI v. BROTHERHOOD OF AMERICAN YEOMEN,
A FRATERNAL BENEFICIARY ASSOCIATION.¹**

May 6, 1921.

No. 22,197.

Mutual benefit — false answer in application — retention of copy by person ignorant of English.

Statements in the application for a benefit certificate in a fraternal beneficiary society were made warranties, which if not true annulled

¹Reported in 182 N. W. 716.

the certificate issued. In an action on the certificate, the defense was that in response to a question in the application, material to the risk, the insured had given an untrue answer to defendant's medical examiner who propounded the question and inserted the answer. It is *held*:

(1) The evidence made it a jury question whether or not the answer inserted was the answer given by the insured.

(2) The fact that the certificate, containing a copy of the application and the answer mentioned, was retained for three months without objection, is not, as a matter of law, conclusive that the insured adopted the false answer as her own, the testimony being that she could not read and did not understand the English language.

(3) There was no error in the refusal to give certain requested instructions. Error cannot be predicated upon the omission to instruct on an issue not presented on the trial.

(4) The record presents no error available in this appeal.

Action in the district court for Ramsey county to recover \$1,000 upon defendant's beneficiary certificate. The defense is stated in the third paragraph of the opinion. The case was tried before Haupt, J., and a jury which returned a verdict in favor of plaintiff. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

J. H. Richards and *Charles E. Bowen*, for appellant.

Wilfrid E. Rumble and *Rosenthal & Danz*, for respondent.

HOLT, J.

A recovery was had upon a benefit certificate issued by defendant, a fraternal beneficiary association. Defendant moved in the alternative for judgment non obstante or a new trial. This appeal is from the order denying the motion.

These facts are established: On July 20, 1918, Mary Gruberski made a written application to defendant for a \$1,000 benefit certificate in favor of plaintiff, her brother-in-law. She was examined by defendant's medical examiner August 1, 1918, and her answers to certain questions relative to her health, physical condition and family history, were by him inserted in the application. On September 19, 1918, the certificate was delivered to her, attached to which was a copy of the application with her answers to the questions mentioned as written by the medical examiner. A fully developed child was born to Mary Gruberski on November 15,

1918, and a month thereafter she died. There is no claim that the child-birth or pregnancy caused or contributed to her death.

It is conceded that her answers to the medical examiner were warranties, which if untrue made the certificate void. The application contained this question: "Are you pregnant?" The answer thereto, inserted by the medical examiner was: "No." The whole defense is rested on the falsity of this answer. The court in substance charged the jury that, under the law governing warranties made by an applicant for membership in a fraternal beneficiary association, there could be no recovery if Mary Gruberski gave that answer to the question. *Farm v. Royal Neighbors of America*, 145 Minn. 193, 176 N. W. 489. It is contended that it was not open to plaintiff to prove that she did not give this answer, because, upon the receipt of the certificate, she, under her hand, indorsed thereon that no change had occurred in her condition as set forth in her application, and in the application she had agreed that the statements made therein were to be copied on her certificate and be held to be her statements.

Mary Gruberski's knowledge of the English language was very limited. She could not read it at all, nor could she write her name. Her signature was by mark. There is evidence that the examination was had through an interpreter, defendant's soliciting agent; also that she answered the question mentioned in the affirmative instead of the negative. On the other hand the doctor testified that no interpreter was used, and that she did not say that she was pregnant. The doctor took her waist measure, and it is passing strange that he should not have noticed her condition, being then five and a half months advanced in pregnancy. Under this state of the record, we think it was for the jury to say whether or not the answer as written by the examiner was her answer.

That the beneficiary is not precluded from showing that the medical examiner, the agent of the insurer, inserted false answers in the application was held in *Finn v. Modern Brotherhood of America*, 118 Minn. 307, 136 N. W. 850, and *Olsson v. Midland Ins. Co.* 138 Minn. 424, 165 N. W. 474.

Nor do we think the rule applied in *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. ed. 934, should here govern, for it is evident that neither the insured nor the beneficiary could read the

certificate or the attached many-paged copy of the application and the numerous confusing questions and answers of the medical examination therein contained, and there is no pretence that the same were explained or interpreted when delivered, or at any time. The rule of *Stanulevich v. St. Lawrence Life Assn.* 228 N. Y. 586, 127 N. E. 315, adopted by the courts of New York, to the effect that if the application signed by the insured is a part of the insurance contract, and contains any false warranty, regardless of whether it was inserted without the knowledge or procurement of the insured, there can be no recovery, has not obtained in this state. In *Reynolds v. Atlas Accident Ins. Co.* 69 Minn. 93, 71 N. W. 831, it was said that the insured, by the retention for three years of a policy containing a copy of the application having a false answer to a question material to the risk, must be deemed to have approved of and accepted the false answer. But there was no showing in that case of inability of the insured to read or understand the language in which the insurance contract was made. In the instant case there was evidence of such inability, and the certificate and copy of the application containing the false statement was in the possession of the insured less than three months. However, that such possession and retention without objection does not conclude the insured, as a matter of law, is now settled law in this state. See fifth paragraph of *Olsson v. Midland Ins. Co.* supra, and authorities there cited.

Error is based upon the refusal to give three requests. It is enough to state that the first two, which upon certain parts of the testimony instructs the jury to return a verdict for defendant, could not have been given, for, as above pointed out, it was for the jury to say whether the answer referred to in the application was the answer Mary Gruberski in fact made to the medical examiner. The third related to an issue not made by plaintiff, for there was no claim that payment of dues to Ulannecki waived the right of defendant to rely on the truthfulness of the warranties. The requests for instructions did not present the proposition now advanced that the jury should have determined whether by accepting the certificate, containing a copy of the application, and retaining it without objection, the insured adopted and made the false answer, written by the medical examiner, her own.

The court may not have accurately stated the position of plaintiff as to

whether or not the question in regard to pregnancy was put to the applicant, for the evidence tended rather to prove that her condition was stated truly and was so evident that defendant's medical examiner could not have avoided observing it—but no request was made to state this more clearly or accurately before the jury retired. In no other respect do we find anything in the charge to criticize, nor were any other specific errors assigned thereon in the motion for a new trial.

The admission of the book upon which an alleged agent of defendant receipted for dues, cannot have been prejudicial, for it only tended to prove payment, a fact not denied.

The order is affirmed.

WILLIAM FURST, AS TRUSTEE OF THE ESTATE OF JOSEPH
E. LACHER, BANKRUPT v. ANNIE LACHER
AND ANOTHER.¹

May 6, 1921.

No. 22,218.

Deed — condition subsequent.

The rule that conditions embodied in a conveyance of real property will be strictly construed, applied. *Held* that, the intent of the parties being clear, their rights and liabilities will be determined and enforced as in other contracts, and that the provisions under consideration created a condition subsequent.

Action in the district court for Hennepin county to adjudge the conveyance described at the beginning of the opinion null and void and the property described therein a part of the estate of the bankrupt. The case was tried upon stipulated facts before Molyneaux, J., who made findings and ordered judgment dismissing the action with prejudice. From the judgment dismissing the action, plaintiff appealed. Affirmed.

Robert M. Works, for appellant.

John N. Berg, for respondents.

¹Reported in 132 N. W. 720.

QUINN, J.

The facts in this action were stipulated by the litigants. Defendants Joseph J. and Annie Lacher are husband and wife and the parents of Joseph E. Lacher. On April 4, 1911, Annie Lacher, being the owner in fee of lots 14, 15 and 16 in block 4, in New Wayzata, in Hennepin county, Minnesota, her husband joining, conveyed, by warranty deed in the usual form, the above described lots to their son, Joseph E. Lacher, without any consideration passing between them therefor. The lots were and ever have been vacant and unoccupied. The deed was duly recorded on April 13, 1911, in the office of the register of deeds in and for Hennepin county, in book 703 of deeds on page 136. Following the description of the lots in the deed appears the following:

"This conveyance is made subject to the following agreement, to-wit: It is agreed and understood by and between the parties herein named that the above described property shall not be sold or conveyed or in any manner whatsoever encumbered, during the lifetime of either of the grantors herein named. And should the Grantee herein named sell, convey or in any manner whatsoever encumber the above described property before the death of either of the Grantors herein named, then and in that case this conveyance shall be null and void and the title to the aforesaid parcels of land shall revert to and be vested in said Annie Lacher, her heirs or assigns."

Having become insolvent, Joseph E. Lacher, on May 23, 1917, executed and delivered to his mother a quitclaim deed of said lots, without any consideration passing therefor, which deed was duly recorded on May 24, 1917. The lots were of the value of \$200, and Lacher's estate was not sufficient to pay the claims of his creditors. On June 5, 1917, Lacher executed and delivered to John P. Galbraith an assignment of all his property for the benefit of his creditors.

This action was brought by the trustee in bankruptcy, to have the conveyance from Joseph E. Lacher to his mother, Annie Lacher, adjudged null and void, the lots therein described adjudged to be a part of the estate of the bankrupt and the same sold as provided by law, and for such other and further relief as may seem equitable. A trial was had in the district court before the judge without a jury. Findings were made and judgment ordered against the plaintiff and in favor of defendants

for their costs and disbursements. Judgment was accordingly entered, from which plaintiff appealed.

It is contended on behalf of appellant that the clause in the deed from the defendants to their son, Joseph E. Lacher, restraining the power of alienation of the property described in the deed, was void, and that the deed operated as an absolute conveyance free from any restraint on the grantee's power of alienation, and that therefore the deed from the son to his mother at a time when he was insolvent, without consideration, was void as to his creditors. It is conceded that if the provision in the deed, restraining the grantee from selling or encumbering the property, is valid, then plaintiff has no right to recover. The contention on behalf of defendants is that the restriction in the deed is a condition subsequent upon the happening of which the title will be defeated.

The language in the condition contained in the deed under consideration is plain and unequivocal. It provides that the property conveyed shall not be sold, conveyed or encumbered during the life of either of the grantors, and that, if the grantee shall sell, convey or encumber the same before the death of either of the grantors, the conveyance shall be void and the title to the land shall revert to and be vested in the grantor, her heirs or assigns. Where the intent of the parties is clear, their rights and liabilities in respect to the conditions are determined and enforced as in other contracts. *Hamel v. Minneapolis, St. P. & S. S. M. Ry. Co.* 97 Minn. 334, 107 N. W. 139. There can be no doubt about the intent and purpose of the parties to the deed and the provision contained therein.

We hold that the provision under consideration created in law a condition subsequent, and, if the grantee failed to comply therewith, the title would revert. While conditions subsequent, which result in a forfeiture upon failure to perform, are not favored, and are strictly construed, they must be upheld, when clearly expressed and not impossible of performance. *Hamel v. Minneapolis, St. P. & S. S. M. Ry. Co.* supra; *Farnham v. Thompson*, 34 Minn. 330, 337, 26 N. W. 9, 57 Am. Rep. 59; *Minneapolis T. M. Co. v. Hanson*, 101 Minn. 260, 112 N. W. 217, 118 Am. St. 623. The trial court correctly held that the provision in the deed under consideration was a condition subsequent and that the plaintiff is not entitled to recover.

Judgment affirmed.

W. J. MOREHART v. C. F. FURLEY.¹

May 6, 1921.

No. 22,238.

Defendant waives objection to jurisdiction by presenting counterclaim.

A defendant may challenge the jurisdiction of the court, and, if his objection is overruled, may answer and defend on the merits without waiving his objection to the jurisdiction. But, if he presents a counterclaim and asks for an affirmative judgment thereon, he invokes the power of the court in his own behalf and thereby submits himself to its jurisdiction.

Action in the district court for Blue Earth county to recover \$2,831.55 and to have the court direct that a second mortgage be assigned to plaintiff in the amount of the judgment. The case was tried before Comstock, J., and a jury which returned a verdict in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Hughes & Ellsworth and *J. A. Baker*, for appellant.

Ivan Bowen and *Leroy Bowen*, for respondent.

TAYLOR, C.

Plaintiff alleges in his complaint that he effected the sale of defendant's farm in Blue Earth county, Minnesota, and that defendant agreed to pay him a specified commission therefor. He also alleges that defendant agreed to secure this commission by a mortgage on the land, but failed and refused to do so; that defendant conveyed the land to the purchaser and took back a second mortgage for a part of the purchase price; and that defendant is not a resident of the state of Minnesota, but resides in the state of Nebraska, and has no property in the state of Minnesota except such second mortgage. The relief asked is that plaintiff have judgment for the amount of his commission and that defen-

¹Reported in 182 N. W. 723.

dant's mortgage be transferred to him "in the amount of said judgment." Plaintiff issued a summons on which the sheriff returned that the defendant could not be found. Plaintiff filed this return and an affidavit for publication of the summons, and then caused the summons to be served on defendant personally in another state, which, under our statute, is equivalent to the publication thereof. Defendant appeared specially for the purpose of the motion only, and moved to set aside the service of the summons on the ground that the court had acquired no jurisdiction over his person or property by such service. The motion was denied by the court. Defendant then interposed an answer in which, after again objecting to the jurisdiction of the court, he not only denied plaintiff's claim for a commission, but alleged that plaintiff had been guilty of fraudulent misconduct while acting as his agent, and that, in consequence thereof, he had been compelled to incur an expense of \$350 for which sum, with interest thereon from March 15, 1920, he demanded an affirmative judgment against plaintiff. The trial resulted in a money judgment in favor of plaintiff for the full amount of his claim. Defendant appeals. The only question presented by the bill of exceptions is whether the court had jurisdiction to render the judgment.

We are of the opinion that the attempted service of the summons gave the court no jurisdiction over defendant or his property, but, as the judgment must be affirmed on another ground, it is not necessary to extend this opinion by setting forth the reasons for that conclusion.

Defendant had the right to challenge the jurisdiction of the court, and, when his motion was overruled, he had the right to answer and defend on the merits, without waiving his objection to the jurisdiction. *Perkins v. Meilicke*, 66 Minn. 409, 69 N. W. 220; *May v. Grawert*, 86 Minn. 210, 90 N. W. 383; *Getty v. Village of Alpha*, 115 Minn. 500, 133 N. W. 159. But defendant did not merely defend against plaintiff's claim. He also asserted an affirmative cause of action against plaintiff and asked for an affirmative judgment against him for the amount thereof. By doing so he voluntarily invoked the power of the court in his own behalf and thereby gave the court jurisdiction over him. *Thompson v. Greer*, 62 Kan. 522, 64 Pac. 48; *Shufeldt v. Jefcoat*, 50 Okl. 790, 151 Pac. 595; *Chandler v. Citizens Nat. Bank*, 149 Ind. 601, 49 N. E. 579; *Lower v. Wilson*, 9 S. D. 252, 68 N. W. 545, 62 Am. St. 865;

Linton v. Heye, 69 Neb. 450, 95 N. W. 1040, 111 Am. St. 556. To hold that a defendant may raise the question of jurisdiction after seeking to recover an affirmative judgment on a counterclaim, would enable him to present and litigate a new cause of action voluntarily, and to bind the plaintiff by the result thereof without being bound thereby himself if the result proved unsatisfactory. He cannot be permitted to speculate on the outcome in any such manner.

Judgment affirmed.

FRANK J. HILLA v. ANTHON C. JENSEN AND OTHERS.¹

May 6, 1921.

No. 22,293.

Arrest without a warrant.

1. Under the statutes of this state, a peace officer may arrest without a warrant, when the person arrested has, in his presence, committed or attempted to commit any public offense, either a felony or a misdemeanor; when he has committed a felony, though not in the officer's presence; when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed it; upon a charge made upon reasonable cause of the commission of a felony by the person arrested; and at night when the officer has reasonable cause to believe that the person arrested has committed a felony, though no felony has in fact been committed. There is no authority for arrest without a warrant because of mere belief that a person has committed a misdemeanor.

Unlawful arrest of residents in apartment building.

2. Peace officers raided a building of 30 apartments, some of which, they had cause to believe, the proprietress used or permitted to be used for purpose of prostitution. There is no evidence that they were in fact so used. Plaintiff and his wife lived in one of the apartments and were arrested without a warrant. There is no claim that the officers believed that they were in any sense connected with the management of the building. There was no thought that they were committing any offense, except the misdemeanor of being inmates of a disorderly

¹Reported in 183 N. W. 902.

house. They were not committing and had not committed that offense. *Held*, their arrest was unlawful.

Action in the district court for Hennepin county to recover \$10,000 for false imprisonment. The case was tried before Fish, J., who at the close of the testimony denied defendants' motion for a directed verdict in their favor, and a jury which returned a verdict for \$80, and costs and attorney's fees, against defendants Michael Johannes and J. P. Gleason. The motion of defendants Johannes and Gleason for judgment notwithstanding the verdict was granted. From the judgment entered in favor of these defendants, plaintiff appealed. Remanded for judgment on the verdict for \$80.

George S. Grimes, for appellant.

Brady, Robertson & Bonner, for respondents.

HALLAM, J.

Mendenhall Court is located on Fifteenth street and Third avenue in Minneapolis. It is a three story and basement building with two separate entrances on Fifteenth street. It was all leased to one party, Mrs. Tremont. She furnished and sublet the apartments, sometimes by the week, sometimes by the month.

Plaintiff enlisted in the regular army in 1902. In 1911 he had become a sergeant and was stationed at Fort Snelling and there he married Regina Paulson, a cook in the household of a colonel stationed there. He continued in the service and his wife was with him as she could be. On August 15, 1917, plaintiff was promoted to captain. In May, 1918, he went overseas and to the Italian front, and he was seriously wounded there on September 13, 1918, and was later invalided home. On August 20, 1918, plaintiff's wife leased, by the month, apartment number 207, a furnished apartment of two rooms, kitchenette and bath, in Mendenhall Court. Plaintiff arrived there December 29, 1918. He was still in the service, part of the time in the hospital, and during the next seven months had four leaves of absence of about 30 days each which he spent with his wife at Mendenhall Court. On August 4, 1919, he was honorably discharged from the service and lived there from that time on. The building was well filled. Many of the subtenants were highly

respectable people, one was a minister of the Gospel, a number of others were families with children. There is no evidence that any part of the building was in fact used for immoral purposes.

Defendants were police officers of the "purity squad" detailed especially to the work of moral clean-up. There is evidence, not controverted, that these officers were informed that the proprietress of this building was knowingly subletting some of her apartments to prostitutes and for purposes of prostitution and dissipation. There is also evidence that early in July, 1918, defendants had received a complaint of drunken men coming out of apartment number 207, and had received a report from one who knew "Captain Hilla" and his wife, that Captain Hilla was separated from his wife, that a Mrs. Terp was her companion during his absence, and that Mrs. Hilla and Clara Olson "were continually running in and out of that flat and taking men up in there. They have been getting whiskey and they have been drunk time and again."

About 1 a. m. of September 7, 1919, defendants raided Mendenhall Court. They arrested the proprietress, went through the building, called on all the occupants, and arrested those whom they thought were there for illicit purposes. They left the minister of the Gospel and all who showed evidence of having children and others, if they "figured they looked decent." When they came to plaintiff's apartment, one of defendants "put Mr. and Mrs. Hilla's name" on a slip of paper, put the slip in his pocket and went on to the next one until he had "a whole stack of peeople," 37 in all.

Plaintiff and his wife were both arrested and sent to the city jail. The testimony is in conflict as to what took place at the apartment when they were arrested. Plaintiff and his wife testified that they told defendants that they were married and that plaintiff was a discharged soldier, and produced their marriage certificate and plaintiff's discharge from the army, but that defendants refused to look at them, but simply said: "Put on your clothes and come along." Defendants denied this, and said plaintiff refused to answer questions or to permit his wife to do so, and told them it was none of their business and that one of defendants then said: "Well, if that is the attitude you take, why dress up and we will be back in a few minutes." It is conceded that

plaintiff had both his marriage certificate and his discharge with him and that he exhibited them to the officers next day.

Some of these details have no bearing on the question of the right of the officers to make the arrest, but have a bearing on the extent of their liability, if they are liable at all. This action is for false imprisonment, not for malicious prosecution. The question is whether defendants had any right to arrest and imprison plaintiff. If not, they are liable in damages, and the circumstances are mainly important as aggravation or mitigation of damages. Defendants had no warrant for plaintiff's arrest. The circumstances under which peace officers may arrest without a warrant are defined in the statutes of the state. The material statutes are as follows:

G. S. 1913, § 9066:

"A peace officer may, without warrant, arrest a person:

1. For a public offense committed or attempted in his presence;
2. When the person arrested has committed a felony, although not in his presence;
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; or
4. Upon charge made upon reasonable cause of the commission of a felony by the person arrested." * * *

G. S. 1913, § 9067:

"He may at night, without a warrant, arrest any person whom he has reasonable cause for believing to have committed a felony, and shall be justified in making such arrest, though it shall afterwards appear that no felony has been committed."

Paragraphs 1 and 2 of section 9066 are not material. There is no claim that plaintiff committed any offense, either felony or misdemeanor.

Paragraph 3 is not material, for there is no claim in this case that a felony had in fact been committed by any one. The trial court expressly ruled that there was no such proof.

Defendants rely mainly on section 9067 which embraces the substance of paragraph 4 of section 9066 and more. We are unable to see how this section can relieve defendants. We find no evidence that defendants had either belief or reasonable cause for belief that plaintiff had committed a felony. The only felony charged, or believed to have been

committed, was that of keeping a house of ill-fame in the premises known as Mendenhall Court. We may assume there was probable cause for belief that part of the building was kept as a house of ill-fame, but the belief of defendants was that Mrs. Tremont was running the house. Defendant Johannes testified very frankly that he didn't think either plaintiff or his wife was running it, never gave that a thought, that it was simply because plaintiff and his wife had an apartment in the building that they were taken, "because," he said, "we were raiding a disorderly house, a house of ill-fame, and you can take any person in there." There was no thought that plaintiff had committed a felony. There was a thought that he was an inmate of a house of ill-fame, and so was committing a misdemeanor by violating a city ordinance, but mere belief that a person has committed or is committing a misdemeanor does not justify even a peace officer in his arrest without a warrant, if in fact no misdemeanor has been committed or attempted.

It is important that moral clean-up work be vigorously prosecuted in cities and that it be not hampered by technical rules of law, but the right of plaintiff to freedom from arrest while behaving himself properly in his home was a substantial right which defendants could not violate, even though they were acting honestly and from laudable motives. The arrest was unlawful and plaintiff has a cause of action for false imprisonment.

The case will be remanded for judgment on the verdict for \$80. The remainder of the verdict is not sustainable.

ALBERTHA DRAKE v. CHARLES L. DRAKE AND ANOTHER.¹

May 6, 1921.

No. 22,306.

Action on bond — judgment on the pleadings.

In an action upon a statutory bond, executed under the provisions of section 8667, G. S. 1913, as amended by chapter 213, Laws 1917, held that the answers raised no issue which required proof to entitle plain-

¹Reported in 182 N. W. 717.

tiff to judgment, and that the motion for judgment on the pleadings and record was properly granted.

Action in the municipal court of Minneapolis against Charles L. Drake and Royal Indemnity Company, surety on his bond, to recover \$545 balance alleged to be due for support of plaintiff, his wife. The motion of plaintiff for judgment on the pleadings was granted, Reed, J. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Eugene S. Bibb, for appellants.

Brady, Robertson & Bonner, for respondent.

QUINN, J.

The defendant Drake was, on February 11, 1919, convicted of failing to furnish proper food, clothing and support to his wife, without lawful excuse, in the municipal court of Minneapolis. In connection therewith the court determined and ordered that he execute a bond to the state of Minnesota, in the amount of \$1,000, with surety to be approved by the court, under the provisions of section 8667, G. S. 1913, as amended by chapter 213, p. 308, Laws of 1917. On June 15, 1920, said defendant executed a bond in accordance with such order of the court, with the defendant Royal Indemnity Company as surety, which bond was duly approved and filed by the court. The here material provisions of the bond are as follows:

"The condition of this obligation is such that whereas the above named defendant was adjudged guilty of nonsupport of his wife, Albertha Drake, in the above entitled action, and whereas the above-named court ordered this defendant to provide a bond in the sum of one thousand dollars for the guarantee of the support of his said wife for a period of thirty-six months after the 11th day of February, 1919;

"Now, therefore, if the said defendant, Charles L. Drake, shall support his said wife at all times before the 11th day of February, 1922, to the best of his ability according to law, at the rate of \$20.00 per week, then this obligation shall be void; otherwise to remain in full force."

On January 11, 1921, the present action was brought to recover the sum of \$2,000 for the first 100 weeks of the time mentioned in the bond,

less \$1,455 paid at intervals thereon. It is alleged in the complaint that at the time of the commencement of this action there had become due and payable on such obligation, the sum of \$2,000 less the sum of \$1,455 paid thereon, leaving a balance of \$545 due the plaintiff on account of her support. The answers admit the conviction of defendant, the execution and filing of the bond and its approval by the court, and affirmatively set forth that the appellant Drake has at all times supported respondent to the best of his ability according to law, and that by reason thereof the bond is void. Then follows a denial that the sum of \$2,000 has ever become due plaintiff thereon and a general denial of all matters set forth in the complaint not admitted in such answers. The answers contain no allegation of payments. The plaintiff moved for judgment on the pleadings which was granted, and judgment was so entered from which this appeal was taken.

It is contended on behalf of defendants that Drake has at all times here in question provided for plaintiff to the best of his ability according to law, and has given to her practically his total income, and that by reason thereof the bond has become void. It is nowhere contended that more has been paid to plaintiff than is stated in the complaint. Sixty-nine weeks elapsed before the filing of the bond, during which time the payments provided for amounted to \$1,380. The sum of \$1,455 had been paid. Applying the payments upon the first instalments due, there were no arrears at the time of the filing of the bond. It is therefore unimportant whether the bond was retroactive in its effect or not. The instalments sought to be recovered in this action became due subsequent to the filing of the obligation. If it were claimed that further payments had been made, the fact should have been pleaded in the answers. The condition of the bond, when considered in connection with the circumstances and in view of the provisions of the statute, clearly provides for the payment of a specified sum of money at stated intervals during the time covered thereby for the support of the plaintiff. The material provision of the statute is as follows:

"But if any person convicted under this section gives bond to the state, in such amount and with such sureties as the court prescribes and approves, conditioned to furnish the wife or child with proper food, shelter, clothing and medical attendance for such a period, not exceeding five

years, as the court may order, judgment shall be suspended until some condition of the bond is violated. The bond may, in the discretion of the court, be conditioned upon the payment of a specified sum of money at stated intervals."

A condition in a statutory bond which conforms substantially with the language of the statute is sufficient. *Lanier v. Irvine*, 21 Minn. 447. The bond under consideration is conditioned for the support of the plaintiff at the rate of \$20 per week, which conforms substantially with the language of the statute. The bond was executed for the purpose of complying with the statute. The obligation thereby created should neither be extended nor restricted, but construed in connection and in harmony with the statute, unless the language of the bond necessarily prevents such a construction. The pleadings raise no issue requiring proof to entitle plaintiff to recover.

Judgment affirmed.

J. V. MARYLAND v. L. R. CHRISTENSON COMPANY AND
ANOTHER.¹

May 13, 1921.

No. 21,863.

Insurance policy — delivery — surrender — questions for jury.

1. Action on a policy of insurance. The policy never left the possession of the agent of the insurance company. The trial court submitted to the jury the question whether the policy ever became effective and also the question whether, if it did become effective, there was a consent to its surrender. The jury found for defendant. There was evidence to sustain a finding for defendant on both propositions submitted.

Objection to charge cannot be raised for first time on appeal.

2. Objection to the charge not made in trial court will not be considered on appeal.

Action in the district court for St. Louis county to recover \$2,000 upon a fire insurance policy. The defendant's contentions are given in

¹Reported in 182 N. W. 951.

the first paragraph of the opinion. The case was tried before Dancer, J., who at the close of the testimony denied defendant's motion for a directed verdict on the grounds that no cause of action had been proved against defendant; that there was a defect in parties plaintiff; that any application for insurance had been canceled by mutual consent prior to the fire; that no contract was ever proved between the plaintiff and the defendant, and a jury which returned a verdict in favor of defendant. From an order denying his motion for judgment notwithstanding the verdict or a new trial, plaintiff appealed. Affirmed.

McCoy & Hansen, for appellant.

Washburn, Bailey & Mitchell, for respondent.

HALLAM, J.

This action is brought to recover on a policy of insurance covering a motor bus, the property of plaintiff. A policy was written. The bus burned. Defendant contended, however, that the policy never took effect as a contract, and that if, from the facts in evidence, it can be said that it did take effect, it was canceled by consent. The court submitted these two issues to the jury and the jury found for defendant. Plaintiff claims that the evidence is insufficient to sustain a finding for defendant on either proposition. While a number of errors are assigned in the manner of submission of the case to the jury, they are for the most part disposed of by a determination of these two questions. We address ourselves to these questions.

1. In June, 1918, plaintiff applied to the Myers Company, an insurance agency at Biwabik, for insurance on this and two other motor buses. L. R. Christenson was manager of the Myers Company and the name was later changed to the L. R. Christenson Company. The agency was unable to place the insurance in any company it represented, and so advised plaintiff. About September 25 it procured an agency for the Sun Insurance Office of Chicago, and on September 25 wrote a policy in that company covering this bus. The evidence as to the other transactions is somewhat in conflict. Plaintiff testified he owed something on the bus on notes that were in a bank at Eveleth, and that when he negotiated for insurance he told Christenson to send the policy to the Eveleth bank. Christenson denies having received any such direction. Christenson, as

administrator, claimed an interest in the bus, and he attached to the policy a rider making loss payable first to himself as administrator. Plaintiff testified he had no knowledge of this until after the fire.

When the policy was written the agency retained it and sent plaintiff a bill for the premium amounting to \$68. This was on a basis of \$3.40 per \$100. A few days later Christenson called plaintiff by phone in regard to payment of the premium. Plaintiff protested the rate was too high, that he was paying only \$1.45 per \$100 at his local bank at Gilbert. After that Christenson said he called up plaintiff four or five times. Plaintiff said he talked to Christenson a number of times and argued back and forth about the rate. Christenson said he would take the matter of the rate up with the company and advise plaintiff. He did take it up with another agent, but accomplished nothing and did not advise plaintiff of the result. The matter ran along until November, when Christenson marked the policy canceled and returned it to the company and directed his clerk to advise plaintiff of that fact. She did so and testified that plaintiff said "all right." It seems clear that, with this evidence before it, the jury might find that the parties never intended a delivery of the policy and that it never became effective.

If the policy did become effective, it is conceded it could not be canceled without notice without plaintiff's consent. From the conversation above mentioned between plaintiff and the clerk of the agency, the jury might find an assent by plaintiff to its surrender and cancellation.

Plaintiff contends that the clerk had no authority to negotiate for a cancellation of the policy. She was authorized by Christenson to do what she did do. Plaintiff's assent if expressed to her was binding on him.

The policy when written was antedated to June 19, a date long prior to any negotiation with the Sun Company or on its behalf. This does not seem a circumstance of any controlling importance. The liability of the Sun Company could not arise prior to the time the policy was written September 25.

2. Exception is taken to a charge of the court that if the policy contained no provision requiring notice of cancellation, the company could

cancel it at any time. No exception was taken to this instruction in the trial court and it will not be considered here. *Petruschke v. Kameron*, 131 Minn. 320, 155 N. W. 205.

Order affirmed.

L. J. MUELLER FURNACE COMPANY v. MARY BURKHART.¹

May 13, 1921.

No. 22,134.

Application of payment.

1. When a debtor pays generally on a continuous account, neither he nor his creditor making an application of the payment, the law applies it to the first item on the debit side.

Mechanic's lien not enforceable.

2. Applying this rule, it is *held* that a heating company which bought material of the plaintiff for use and which it used in a house of the defendant paid the plaintiff, and that the plaintiff cannot enforce a lien.

Action in the district court for Carver county to recover judgment for \$171.51, and foreclose a mechanic's lien for the same. The case was tried before Tift, J., who made findings and ordered that the action be dismissed. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

H. A. Welch, for appellant.

W. C. & W. F. Odell, for respondent.

DIBELL, J.

Action to foreclose a mechanic's lien for material sold by the plaintiff, a corporation having its principal place of business at Milwaukee, to the Taplin Heating Company, a copartnership doing business at Minneapolis, and by the latter used in the construction of the defendant's house. The defense was payment to the plaintiff by the heating company. The court

¹Reported in 182 N. W. 909.

found payment. The plaintiff appeals from the judgment in favor of the defendant.

1. The rule is that when a debtor pays generally on a continuous account, neither debtor nor creditor making an application, the payments will be applied on the basis of priority, and the oldest debit item will be first paid, or, in other words, the law applies payments made on the first unpaid debit items. *Hersey v. Bennett*, 28 Minn. 86, 9 N. W. 590, 41 Am. St. 271; *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. 74; *Board of Co. Commrs. of Redwood County v. Citizens Bank of Redwood Falls*, 67 Minn. 236, 69 N. W. 912; *Pond & Hasey Co. v. O'Connor*, 70 Minn. 266, 73 N. W. 159, 248.

2. The plaintiff kept a loose leaf ledger account with the Taplin company. It designated on the debit side the person for whose use the material furnished was intended. That used in the defendant's house was marked on the ledger account "Burkhart job," or by a similar designation. Material was sold to the heating company for use in particular jobs. The credits were not applied. They variously appear as "cash," "discount," or "credit memo." The credit items were considerably greater in amount than necessary to pay the heating company's debit for the material furnished for the defendant's house, and all prior debits. Applying the rule stated in paragraph 1, which controls when the parties make no application, the heating company paid the plaintiff for the material used in the defendant's house.

Judgment affirmed.

LILLIAN S. BOECHER v. CITY OF ST. PAUL AND OTHERS.¹

May 13, 1921.

No. 22,136.

Snow and ice on sidewalk — Liability of lot owner.

1. Lot owners are not liable to pedestrians for injuries caused by stumbling or slipping on accumulations of snow and ice which form from natural causes on the adjacent sidewalk.

¹Reported in 182 N. W. 908.

Same — liability of builder of temporary walk.

2. Where a builder engaged in erecting a building is authorized by the city to occupy a portion of the adjacent street and to lay a temporary walk around the obstruction, his acts done under and within the authority granted are lawful, and he is not liable to a pedestrian for injuries caused by stumbling or slipping on an accumulation of snow and ice formed by natural causes on a temporary walk constructed under such authority.

Action in the district court for Ramsey county to recover \$2,000 for injuries received from falling upon an icy walk. The separate answers alleged negligence on the part of plaintiff. The case was tried before Hanft, J., who at the close of the testimony denied the motions of the Union Depot Company, Morris, Shepard & Dougherty and George J. Grant Construction Company, for directed verdicts, and a jury which returned a verdict for \$650. From an order granting the motion of defendants other than the city of St. Paul for judgment notwithstanding the verdict, plaintiff appealed. Affirmed.

Briggs, Weyl & Briggs, for appellant.

Barrows, Stewart & Metcalf, for respondents.

TAYLOR, C.

In February, 1919, Morris, Shepard & Dougherty and the George J. Grant Construction Company were engaged in constructing the headhouse of the St. Paul Union Railway Station under and pursuant to contracts with the St. Paul Union Depot Company. They procured a permit from the city of St. Paul to use a portion of Sibley street adjacent to the headhouse for a specified time in connection with the work. They were required by the permit to make and maintain "a clear walk four feet wide" around the portion of the street which they were permitted to occupy, and they made and maintained the prescribed walk. On the evening of February 27, 1919, plaintiff, while traveling along this walk, slipped or stumbled on a ridge or hummock of snow and ice formed by the feet of the pedestrians during and after a snowstorm, and sustained injuries for which she brought suit against the city, the depot company and the contractors. She recovered a verdict against the depot company and the contractors, but the court subsequently rendered judgment in their favor notwithstanding the verdict. She appealed.

The sole question presented is whether a property owner and his contractors, who have been granted by the city the right to occupy a portion of a street while engaged in building operations, and who have constructed a temporary sidewalk in the manner and of the character prescribed by the city around the portion of the street so occupied, are liable for injuries resulting to pedestrians from falls caused by stumbling or slipping on ridges or hummocks of snow and ice which form from natural causes on such temporary sidewalk.

Lot owners are not liable to pedestrians for injuries sustained in consequence of stumbling or slipping on ridges or hummocks of snow and ice which form from natural causes on the adjacent sidewalk. 13 R. C. L. 415, and cases there cited; *Noonan v. City of Stillwater*, 33 Minn. 198, 22 N. W. 444. They are not liable to pedestrians for injuries resulting from a defect or dangerous condition in the sidewalk, unless they created such defect or dangerous condition.

The depot company and its contractors clearly were not liable to plaintiff for the injuries in question, unless the fact that they had provided a temporary sidewalk to serve the public, while they occupied the original sidewalk, imposed upon them liabilities in respect to such temporary sidewalk which did not exist in respect to the original sidewalk. The law recognizes that, when buildings are being constructed in cities, it is sometimes necessary to occupy a portion of the adjacent street, and permits the builder to occupy so much thereof as may be necessary to enable him to carry on his operations. The city may control and regulate the extent and manner in which the street may be used for such purpose, and where the sidewalk is obstructed may require the builder to provide a temporary passageway for pedestrians. In the present case the contractors were rightfully occupying a portion of the street under authority from the city, and they had complied with the requirements of the city by laying a temporary sidewalk around the obstruction for the use of travelers. The occupation of the street and the laying of the walk, having been authorized by the city, were lawful. 13 R. C. L. 219.

We have not been cited to any case holding that under such circumstances the law imposes on a contractor or builder any other or greater responsibility in respect to such temporary passageways than it imposes

on an adjacent property owner in respect to a permanent sidewalk. On the contrary, it has been held that a builder or contractor, who makes such a temporary passageway reasonably safe for travelers, is not chargeable with liability for injuries because it may not be as safe or convenient as the permanent sidewalk. *Nolan v. King*, 97 N. Y. 565, 49 Am. Rep. 561. The depot company and the contractors, having acted under and within the authority granted by the city, were relieved from any charge that they had established a nuisance in the street, and were only liable for injuries which resulted from their own negligence. 3 Dillon, Mun. Corp. (5th ed.) § 1172; *Power v. Rodgers & Hagerty*, 16 App. Div. 194, 144 N. Y. Supp. 747. They were not liable for injuries caused by stumbling and falling on accumulations of snow and ice deposited on the temporary walk by the elements and thereafter trampled into ridges and irregularities by the feet of passing pedestrians.

Judgment affirmed.

BROWN, C. J. (dissenting).

The contractors made application to the city for permission to make use of a portion of the street and sidewalk in question for the deposit of material to be used in the building then under construction by them for the abutting lot owner. The application was granted, but on the express condition that they make and maintain a "clear walk four feet wide" around the obstruction thus created, and "save the city harmless from any and all suits, damages, costs and charges that may accrue from the applicant's use of said place." They accepted the privilege granted, with the conditions attached, and subsequently constructed the substitute walk and thereafter made use of the regular sidewalk with their building material. Ice and snow were negligently permitted to accumulate and remain upon the substitute walk to such an extent as to form ridges and unevenness rendering it unsafe for public use. That condition of the walk was the cause of the injury to plaintiff.

In my opinion the facts stated, which are not in dispute, made a case for recovery, and the trial court erred in directing judgment for defendant notwithstanding the verdict. The stipulation to "make and maintain" the substitute walk imposed upon the contractors the obligation to keep and maintain it in safe and suitable condition for public use.

5 Words & Phrases, 4277; 19 Am. & Eng. Enc. (2d ed.) 610 and citations. The Guardians of the Poor v. The Justices, L. R. 10 Q. B. Div. 480. The case of Noonan v. City of Stillwater, 33 Minn. 198, 22 N. W. 444, 53 Am. Rep. 23, is inapplicable to the facts here presented and not in point. The city of St. Paul by its charter is clothed with legislative power to prohibit the obstruction of streets and sidewalks in the manner here involved, and the right to prohibit includes and embraces the right of regulation and control. The contractors accepted the regulatory conditions imposed by the city and are bound thereby. The statement in the opinion that there is no liability in such cases for defects arising from "natural causes" is a little vague and indefinite. Most defects in public sidewalks arise from natural causes, wear and tear and the like, but the defect here complained of was the result of negligence in the failure of defendants to maintain the substitute walk in safe repair for public use as they had agreed to do. The jury so found.

I therefore respectfully dissent.

DIBELL, J. (dissenting).

I agree with the Chief Justice.

C. H. REYNOLDS v. PIKE-HORNING GRANITE COMPANY
AND ANOTHER.¹

May 13, 1921.

No. 22,183.

Specific performance — undeveloped stone quarry.

1. The defendant leased to the plaintiff for 10 years a large tract of land in which there was a partially developed stone quarry, and agreed to convey to him one-half of the land at the expiration of the lease, it being then in force. The plaintiff did not agree to develop a quarry and expressly exempted himself from liability for a failure to do so. The parties contemplated, as a vital part of the consideration for a grant of one-half the lands, that the plaintiff would develop or make a genuine effort to develop a quarry, and such development or effort to develop

¹Reported in 182 N. W. 906.

was an implied condition of the agreement to convey. There was no such development or effort to develop, and the court rightly denied specific performance.

New trial denied.

2. The court did not err in denying a new trial upon the ground of accident or surprise.

Action in the district court for Kanabec county for specific performance of a contract. The answer of Pike-Horning Granite Company alleged that the contract of September 9, 1908, was null and void, for the reason that there was no mutuality of agreement expressed therein and that there was a total absence of consideration running to it. The case was tried before Searles, J., who made findings that defendants were entitled to judgment dismissing the action. From an order denying his motion to amend the findings and conclusions of law or for a new trial, plaintiff appealed. Affirmed.

McDowell & Fosseen and George L. Spangler, for appellant.

George H. Hammond and Ferris M. White, for respondents.

DIBELL, J.

Action for the specific performance of an agreement to convey an undivided one-half of certain lands. There were findings for the defendant. The plaintiff appeals from the order denying his motion for a new trial.

1. The agreement which it is sought to enforce specifically is contained in a lease dated September 9, 1908, made by the defendant to the plaintiff, covering by government description 200 acres of land in Kanabec county. Upon this land was a partially developed granite quarry of small extent. The lease ran for 10 years and included buildings and machinery which had been used by the defendant in working the quarry. The plaintiff was given the right to use the timber on the land in the conduct of the quarry. He agreed to pay one dollar per year rental for the first five years, but was to pay no royalty. After the first five years he was to pay, in addition to the one dollar annual rental, a stipulated royalty per cubic foot upon the granite of a stated quality quarried and shipped, and for granite not of the stated quality no royalty was to be paid. He paid the annual rental for the first five years

and tendered the rental for the second period of five years and it was refused.

The plaintiff took possession. He operated the quarry after a fashion for a total of 10 months in two different periods. Work ceased about September, 1912. The quarry pit was not substantially enlarged by the work done. Some granite was removed. Since work stopped the buildings and machinery have deteriorated. The land was worth \$40,000 when the lease was made.

The lease provided "that upon the termination of said term of ten years hereby granted, providing this lease shall then be in force, the party of the first part [defendant] will upon the demand of the party of the second part [plaintiff], his heirs or assigns, without further consideration, convey to said party of the second part, his heirs or assigns, an undivided one-half of all of the personal property and real estate hereinbefore described, * * *; or, if the party of the second part, his heirs or assigns shall then demand, the party of the first part, its successors or assigns, will convey the entire property * * * to the party of the second part, his heirs or assigns, for the sum of \$40,000 free and clear of all encumbrance."

It was agreed that "this lease is made for the purpose of enabling the party of the second part [plaintiff] to develop and operate a granite quarry upon said leased premises and that it is to the advantage of both parties that such quarry should be developed; but that the party of the second part does not bind himself to create a paying quarry upon said leased premises or to take out therefrom at any time during the continuance of this lease, any specified amount of granite; nor shall the party of the second part, his representatives or assigns be liable for failure from whatever cause to create and operate a successful quarry on said land."

The so-called annual rental was nominal. The stipulated royalty might never accrue, for the plaintiff did not agree to take out royalty bearing granite. He expressly exempted himself from liability for a failure to develop a quarry. What the parties had in mind, as a vital part of the consideration of the agreement to convey without further consideration one-half of the land, was the development of a working quarry, or at the least a genuine and good faith effort to develop such

a quarry. At the end of the 10-year period the quarry had not been developed; altogether but a few months work had been done, none at all for six years, and there had not been an effort to develop meeting the requirement stated. Such development, or effort to develop, was an implied condition of the right to have, without further consideration, a deed of one-half of the land.

The contract is an unusual one and a parallel case is not found. The following illustrate a kindred principle: *People's Gas Co. v. Dean*, 193 Fed. 938, 113 C. C. A. 566; *Eastern Ky. Mineral & Timber Co. v. Swan-Day Lumber Co.* 148 Ky. 82, 46 L.R.A.(N.S.) 672; *Florence Oil & Refining Co. v. Orman*, 19 Colo. App. 79, 73 Pac. 628; *Hawkins v. Pepper*, 117 N. C. 407, 23 S. E. 434; *Shenandoah Land & Anthracite Coal Co. v. Hise*, 92 Va. 238, 23 S. E. 303. In *Mineral Land Inv. Co. v. Bishop Iron Co.* 134 Minn. 412, 159 N. W. 966, L.R.A. 1917D, 900, an implied condition was negatived. The plaintiff is not entitled to specific performance.

2. We find nothing of merit in the plaintiff's claim of accident or surprise entitling him to a new trial. There was a prior contract dated March 21, 1908. The defendant pleaded it in its answer. The plaintiff claims that the defendant failed to perform, that damages accrued to him, and that his giving up the right to recover such damages and entering into the September contract furnished an adequate consideration for the defendant's agreement to convey.

The trial court did not err. At the trial both parties somewhat departed from the claims in their pleadings, but neither was misled by the claims of the others. Whatever the merits of the controversy over the March contract, the September contract contemplated as a condition to a grant of one-half of the land the development of or a genuine effort to develop a quarry, and the outstanding fact is the absence of both.

Order affirmed.

ARTHUR A. APPLEBY v. JOHN BARTON PAYNE, DIRECTOR
GENERAL OF RAILROADS, AS AGENT, AND ANOTHER.¹

May 13, 1921.

No. 22,184.

Damages — extent of paralysis — verdict excessive.

Plaintiff sustained injury while in defendant's employ. The evidence is ample to sustain a finding of defendant's negligence. Plaintiff claims paralysis of the left arm and leg. A verdict in the amount rendered can stand only on the assumption that paralysis of both arm and leg is permanent. The evidence is sufficient to sustain a finding of permanent paralysis of the left arm, but not of the left leg. The damages are excessive.

Action in the district court for Hennepin county to recover \$50,000 for injuries received while employed as freight conductor on defendant railway. The answer alleged negligence on the part of plaintiff. The case was tried before Molyneaux, J., and a jury which returned a verdict in favor of plaintiff for \$30,000. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed.

Barrows, Stewart & Metcalf, for appellant.

George C. Stiles and F. M. Miner, for respondent.

HALLAM, J.

Plaintiff was a freight conductor on the defendant's railway in Wyoming. On September 30, 1919, he was climbing a ladder on the side of a box car. The grab iron on the top of the car was defective, and, when he grabbed it, it gave way and he fell backwards some 12 or 14 feet to the rock ballast beside the track. He was taken to defendant's hospital at Casper, Wyoming. After remaining there about 10 days he went to another hospital at Casper and remained there until October 30. He then went to the Asbury Hospital in Minneapolis and he con-

¹Reported in 182 N. W. 901.

tinued there until the time of the trial in June, 1920. The action is for damages for personal injuries. Plaintiff had a verdict for \$30,000.

That the evidence is sufficient to sustain a finding of liability is not disputed. The question in the case is as to the amount of damages. Defendants contend they are excessive. Plaintiff contends that he has suffered true paralysis of the left arm and leg and that the injury is permanent. Defendants contend that plaintiff is not suffering from paralysis at all.

It is difficult for an appellate court, without having seen either the plaintiff or the witnesses, to form a correct judgment as to the nature of plaintiff's trouble. At the time of the trial he had been in one or the other of the hospitals mentioned continuously since the accident. He appeared in court in a wheel chair. His appearance evidently impressed the jury with the sincerity of his claims.

Unfortunately, perhaps, the questions of the nature and permanency of plaintiff's injury are both matters for experts. It is difficult for the lay mind to form a just estimate of either. Two experts testified on each side. In point of character and professional standing and experience, they are among the first in their specialty in the locality.

Plaintiff's experts gave the opinion that plaintiff was suffering from true paralysis. Defendant's experts gave the opinion that plaintiff was not suffering from paralysis. On that proposition the issue was squarely made. The jury by their verdict found for plaintiff. We find in the record nothing to discredit the testimony of plaintiff's physicians. We do not hesitate to affirm the finding of the jury on this point.

The difficulty we have is as to proof of probable duration of the injury. So large a verdict can stand only on the assumption that the paralysis of both arm and leg is permanent. It is conceded that true paralysis is not necessarily permanent. The question is whether there is evidence from which a jury could find permanent injury in this case. If the testimony of plaintiff's medical experts sustains the theory of permanency of injury, the verdict should be sustained. But, if plaintiff's own witnesses do not sustain this theory, the verdict cannot be sustained.

As to the arm, plaintiff's witness, Dr. Crafts, testified: "I think there is permanent paralysis." "I don't think there will be ever any material improvement in the condition of the left arm." Dr. Beard, not so posi-

tive, said: "Considering the length of time since the injury I cannot entertain a hope of any measure of recovery for the left arm." From these opinions the jury might find permanent paralysis of the arm.

As to the leg, Dr. Crafts said it has been improving in strength and sensation, he can bear weight on it a little, there is true paralysis "in a slight measure." Asked his opinion as to whether there will, in the future, be any improvement, he answered: "There may be," and further: "I think it is impossible to say at present whether there is going to be any material improvement in the leg or not." At the same time he thought no one could say from the present condition that there will be any improvement. He closed by saying the paralysis of the left leg is not a very complete or severe paralysis.

Dr. Baird when asked his opinion whether the paralysis of the leg will improve said: "I don't think anybody can tell." "Impossible to say. After seven or eight months following such an injury the recovery of such true paralysis is a very doubtful matter indeed."

In our opinion this testimony is not sufficiently definite to sustain a finding of permanent paralysis of the leg. It leaves the future altogether in the realm of speculation and conjecture. It is not a case where a readjustment can well be made by the alternative of a reduced verdict and a new trial must be granted. There is, however, no occasion for another trial of any other issue. A new trial is accordingly granted of the issue of the amount of damages and of no other issue.

Reversed.

DELLA HENDRICKSON v. TOWN OF QUEEN.¹

May 13, 1921.

No. 22,192.

Town liable for cost of nursing illegitimate minor.

1. The serious illness of a minor, born out of wedlock and residing with an uncle in the defendant town, necessitated his removal to a hospital, where he was nursed by the plaintiff. She requested his al-

¹Reported in 182 N. W. 952.

leged father to pay for her services after a stated time, but he declined. She then requested the defendant town to pay her, but it also declined. *Held*: That she was entitled to recover from the town whether the minor had a legal settlement therein or not and without reference to the question of his paternity.

Father of such minor liable — town of legal settlement liable, when.

2. If the minor had a father able to support him, the father was ultimately liable for the payment of the necessary expenses. If he had no relative who was liable and his legal settlement was in another town, such town could be compelled to pay the expenses.

Child legitimized by marriage of his parents.

3. An illegitimate child is legitimized by the marriage of his parents.

Father liable for support of emancipated minor.

4. The father of a minor, whom he has emancipated, is not thereby relieved from the obligation to support an indigent child imposed by G. S. 1913, § 3067.

Action in the district court for Polk county to recover \$930 for services as nurse. The answer was a general denial. The case was tried before Watts, J., who made findings and ordered judgment for \$220. From an order denying its motion for amended findings and conclusions of law or for a new trial, defendant town appealed. Affirmed.

F. A. Grady, for appellant.

Charles Loring and *G. A. Youngquist*, for respondent.

LEES, C.

Plaintiff sued for the value of her services rendered as a special nurse in caring for Gilbert Svauleson, an 18-year-old boy, whom she alleged was a public charge upon the defendant town. There was a trial by the court without a jury and findings in plaintiff's favor, and defendant has appealed from an order denying its alternative motion for amended findings or a new trial.

The findings were that on December 15, 1919, Gilbert was brought to a hospital at Fosston for medical treatment. His condition was such that it was necessary to place him immediately in the care of a special nurse and to keep him under her care until May 13, 1920. On February 8, 1920, plaintiff notified defendant of Gilbert's condition and that

she was caring for him. She rendered services as Gilbert's nurse between that date and March 24, 1920, of the reasonable value of \$220, which has not been paid. On March 29, 1920, she filed with the town clerk a verified statement of her claim. There was a specific finding that between the eighth of February and the twenty-fourth of March, Gilbert was a public charge on the defendant town and had his settlement and place of residence therein.

The evidence showed that Gilbert was born in the town of Queen on March 8, 1901; that his mother was an unmarried woman, who in June, 1901, married John Svalessen and went with him to the town of Pine Lake, where they thereafter resided. Gilbert was treated as a member of Svalessen's family until his mother died in January, 1915, when he was taken to the home of his mother's brother in the town of Queen, where he lived up to the time of his removal to the hospital. Gilbert had about \$250, which Svalessen took and deposited in a bank. Inferentially it appears that this money was expended for medical treatment for him. After it was exhausted, plaintiff asked Svalessen to pay her for her services, but he declined to do so. She then asked the town clerk of the town of Queen what she should do, and he told her to continue to nurse Gilbert—that the law was such that she would not lose her pay. His version of the conversation was that he told her the town would not pay her bill unless it had to. Svalessen is a prosperous farmer and still a resident of the town of Pine Lake.

The statutory law of this state is that every poor person shall be supported by his relatives named in the statute, in the order in which they are named; that, if they refuse or fail to support him, he shall receive such relief as he may require from the county, town, city or village in which he has a settlement; that a minor, not emancipated and settled in his own right, shall have the same settlement as the parent with whom he last resided, and that whenever a person, not having a legal settlement in the municipality where he is taken sick, is in need of immediate relief and is unable to depart therefrom and is so sick as to render it unsafe or inhuman to remove him, he shall receive relief from such municipality. The expense incurred becomes a charge on the county, and it may recover the same from the municipality in which such person has his settlement. Sections 3067, 3069, 3071, 3096, G. S.

1913. These statutory provisions have been considered in a number of cases.

In *Town of Cordova v. Village of Le Sueur Center*, 74 Minn. 515, 77 N. W. 290, 430, it was held that a town furnishing support to a poor person whose settlement is in another town may recover from the latter town, which may in turn recover from the relatives liable for his support.

In *Robbins v. Town of Homer*, 95 Minn. 201, 103 N. W. 1023, it was held that the duty of the town supervisors to provide medical care for a poor person, who is a charge on the town, does not depend upon a request to provide such care, that if, by reason of an emergency, immediate medical attention is necessary, the physician who furnishes it may recover from the town, although it did not employ him or authorize his employment.

In *Manthey v. Schueler*, 126 Minn. 87, 147 N. W. 824, Ann. Cas. 1915D, 241, it was said that, if the relative charged with the support of a poor person refuses to support him, a municipal body furnishing support may recover from such relative.

Tryon v. Dornfeld, 130 Minn. 198, 15 N. W. 307, L.R.A. 1915E, 844, holds that in an emergency case a physician rendering necessary services to a poor person may recover from a relative charged with his support, although the services were rendered without the knowledge of such relative.

In *Brabec v. Boedigheimer*, 132 Minn. 370, 157 N. W. 508, the court said that a father is liable to a physician for services rendered to his adult son, if the latter was a poor person unable to earn a livelihood, but otherwise he is not.

In *Town of Iona v. County of Todd*, 135 Minn. 183, 160 N. W. 669, it was intimated that, if a poor person had no legal settlement anywhere, the town in which he happened to be when he became a public charge was bound to support him.

The statutory provisions and these decisions lead to the conclusion that when Svalesen refused to provide the medical care and attention which Gilbert's serious illness required, the duty to so provide devolved on the town of Queen. We think the duty existed, whether he had a legal settlement in the town or not, and without reference to the ques-

tion of his paternity. If his legal settlement is in the town of Pine Lake, as defendant asserts it is, the statute provides a method of enforcing the liability of that town for the expenses incurred. *County of Redwood v. City of Minneapolis*, 126 Minn. 512, 148 N. W. 469. If Svaleson is Gilbert's father, he can be compelled to defray the expenses.

Citing a number of well considered cases, defendant's counsel earnestly contends that Gilbert was not a pauper, because he had a father with ample means to provide for his relief after he became sick and penniless. The language of section 3069, G. S. 1913, answers this contention. Even if Svaleson is Gilbert's father, his refusal to pay the boy's bills when asked to do so made it the duty of the public authorities to furnish the necessary medical care and treatment. Much was said in the argument about Gilbert's alleged emancipation. We do not regard that as a matter of great importance in view of the facts disclosed by the evidence. The proof was all to the effect that Svaleson is Gilbert's father. If he is, his marriage to Gilbert's mother legitimized the boy. Section 7105, G. S. 1913. Granting that he emancipated him, he did not thereby relieve himself from the duty which the law imposes on the father of a sick and indigent child. Section 3067, G. S. 1913. The question of emancipation became material only in determining whether Gilbert's settlement was in the town of Queen or the town of Pine Lake. The court found that it was in the former town, from which it may be inferred that it reached the conclusion that Gilbert had been emancipated. There was sufficient evidence to warrant such a conclusion.

We express no opinion respecting Svaleson's ultimate liability for the payment of the expenses of Gilbert's sickness except to say that, if he is the boy's father, he is liable. He is entitled, however, to his day in court when it is sought to charge him on the ground of his alleged parentage.

Order affirmed.

JAY W. CRANE, AS ADMINISTRATOR OF THE ESTATE OF
ELLA VELEY HAMP, DECEASED v. CHARLES VELEY
AND ANOTHER.¹

May 13, 1921.

No. 22,196.

Ejectment — findings supported by evidence.

1. Action in ejectment. Plaintiff relied on a certain deed. Defendant contended and the court found that the grantor in the deed was incapable of understanding the nature of the transaction; that the deed was without consideration and was obtained by fraud. The evidence sustains these findings.

Cancellation of instrument.

2. Plaintiff sued as administrator of the estate of the grantee in the deed. There are heirs who are not parties to the suit. It was not error for the court to adjudge that the deed is void and that the record of the deed and the registration certificate issued thereon be canceled.

Defense of possession.

3. The grantor in the deed is now deceased. She left a will giving to the grantee the land covered by the deed. Probate of the will was contested by defendant who is a son of the testator. The will was disallowed by the probate court and an appeal is now pending. These facts do not preclude defendant from maintaining his defense based on possession.

Action of ejectment in the district court for Ramsey county and to recover \$200 damages for withholding the property and \$40 for its use and occupation. The case was tried before Dickson, J., who made findings and ordered judgment in favor of defendants. Plaintiff's motion for amended findings was granted in part. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Jay W. Crane, for appellant.

Stan D. Donnelly, for respondents.

¹Reported in 182 N. W. 915.

HALLAM, J.

Plaintiff, as administrator of the estate of Ella Veley Hamp, brought this action to eject defendants, husband and wife, from a house and lot in Saint Paul. Deceased, Ella Veley Hamp, and defendant Charles Veley were brother and sister and children of Anna E. Veley, the former owner of the property. Plaintiff claims under a deed from Anna E. Veley to Ella Veley Hamp. Defendant Charles is in possession and claims that the deed is void and justifies his possession as one of the heirs of Anna E. Veley, and as administrator of her estate. The trial court held the deed to Ella Veley Hamp void. Plaintiff appeals.

1. The case turns on the validity of this deed. At the time of its execution Mrs. Veley was 81 years old. Up to 1909 she had lived with her husband in Salem, Oregon. In that year her husband died intestate. There were three children, Charles, Ella and Minnie. The next year Mrs. Veley came to Saint Paul and bought the property here in controversy. After paying for it she had a small amount of money left and she received a small pension. She lived in the house and Charles and Ella lived with her. In 1912 Charles married. There was some disagreement between his wife and sister, and from September, 1913, he and his wife lived elsewhere. In March, 1914, Charles commenced proceedings in the probate court of Ramsey county for the appointment of a guardian for Mrs. Veley. On March 18 a partial hearing was had, and after some informal talk the proceeding was continued to be heard on notice by either party. Three days later Mrs. Veley deeded this property to her daughter Ella, reserving a life estate in herself. The trial court found that Mrs. Veley was incapable of understanding the nature of the transaction, that the deed was without consideration and was obtained by Mrs. Hamp through abuse of the confidential relation subsisting between her and her mother, and by taking an unconscionable advantage of her mother's incapable condition.

Plaintiff contends that these findings are not sustained by the evidence. We do not agree with this contention. Several witnesses testified on each side. The judge of probate was sworn as a witness, and his testimony is clear and positive to the effect that Mrs. Veley was "incompetent and suffering from senility." He further testified that he continued the matter after suggesting that a copy of the petition be filed

with the register of deeds which would render any conveyance ineffective, and after telling her not to sign any papers. She said she wouldn't, saying she wanted her property to go to her children and did not want to give one advantage over the other. He further testified that she called on him again the following week after the execution of the deed and wanted to know what was going on, said she did not want to lose her property and never stated that she had given the deed. No reason appears why she should have desired to give substantially all her property to one child.

On the other hand the deed was prepared by a reputable and careful attorney who testified that Mrs. Veley came to his office with her daughter, and that he drew the deed and witnessed its execution and that he believed her competent. She was a stranger to him and the incident was the ordinary one of strangers calling to have a deed drawn and executed. The court might have found either way on the subject of validity of the deed. The evidence is ample to sustain the finding that it was invalid.

2. The court adjudged that the deed is void, and that the deed and the certificate of title issued thereon be canceled, and that plaintiff has no right to the possession of the property. Plaintiff contends that the court is without jurisdiction to render this decree. The argument is that the court is determining a "counterclaim" of the defendant, and that the heirs of Ella Veley Hamp are indispensable parties to the determination of this "counterclaim." Plaintiff himself, as administrator of the estate of Ella Veley Hamp, brought this action. He had a right to do so under a statute which provides that an administrator "may himself, or jointly with the heirs or devisees, maintain an action for the possession of real estate or to quiet title to the same." G. S. 1913, § 7296. See *Wheeler v. McKeon*, 137 Minn. 92, 162 N. W. 1070, 1 L.R.A. 1514. He might therefore have joined the heirs, but he was not obliged to do so. In his complaint he set up the deed above mentioned as the source of his title and right of possession, and on the trial he offered it in evidence as the proof of his title. Clearly it was proper for the defendant to meet this proof by showing that the deed was void. This was in no sense proving a counterclaim. On such proof it was proper for the court to adjudge that the deed, on which plaintiff predicated his title and right of possession, was void. He invited a de-

termination of this question, and he cannot now complain that the question has been determined. *Quinn v. Minneapolis*. T. M. Co. 102 Minn. 256, 113 N. W. 689. The demand in the answer and the determination by the court that the deed and the certificate of title issued thereon be canceled, added but little, and really injected no new issue. Whether this decree is binding on the heirs is a question not now before us for decision.

3. The court found that on March 29, 1920, defendant was appointed administrator of the estate of Anna E. Veley, deceased, by the probate court of Ramsey county; that his appointment was opposed by the sons of Ella Veley Hamp who produced a purported will of Anna E. Veley devising the property in dispute to Ella Veley Hamp; that the probate court disallowed the will and an appeal to the district court was taken and is still pending and undetermined. Plaintiff now contends that until that appeal is determined, defendant cannot maintain his defense.

The appeal suspended the order of the probate court. G. S. 1913, § 7494. If defendant were the aggressor it may be that he would be denied relief as long as the fate of the will, which if valid would deprive him of the property, is undetermined. In such a case, he might with reason be required to establish his title against all adverse instruments of title. 2 Black, Cancellation and Rescission, § 551.

But for substantially the same reason a defendant in possession cannot be ejected by a false claim of title in plaintiff because another claim of title alleged by plaintiff has not been determined. Defendant's "possession is title and is good title against all the world except those who can show a better one." *Herrick v. Churchill*, 35 Minn. 318, 29 N. W. 129; *Rogers v. Clark Iron Co.* 104 Minn. 198, 209, 116 N. W. 739.

Judgment affirmed.

S. J. BENNETT v. FOX FILM CORPORATION.¹

May 13, 1921.

No. 22,198.

Injunction to prevent irreparable injury.

1. The courts may enjoin a party from breach of a contract when necessary to prevent irreparable injury. The matter rests largely in the discretion of the trial court. When an injunction necessarily requires the doing of affirmative acts of performance, the relief will be sparingly granted.

No abuse of discretion.

2. Contracts involved in this action are construed to give plaintiff substantial rights, and there was no abuse of discretion in enjoining their violation by defendant.

Action in the district court for St. Louis county for a temporary injunction restraining defendant from violating the provisions of certain contracts and that defendant be adjudged specifically to perform the contracts. From an order granting plaintiff's motion for a temporary injunction during the pendency of the action, Dancer, J., defendant appealed. Affirmed.

Charles J. Eisler, for appellant.

Washburn, Bailey & Mitchell, for respondent.

HALLAM, J.

Plaintiff operates the Tempest Theatre in West Duluth. Defendant is a producer and distributor of motion picture films. Plaintiff alleges that on March 29, 1920, the parties entered into two written agreements. By one, defendant agreed, during the year commencing May 17, 1920, and terminating May 16, 1921, to furnish and release to plaintiff one "Excel" picture every second week, to be furnished successively in the order in which the same were released, and to grant or license the use of one

¹Reported in 182 N. W. 905.

copy of each of said films at said theatre for two successive days. The term "Excel Picture" is defined to mean "only such pictures which have been released * * * in the past under the 'Excel' brand and such future releases as shall be designated by the distributor as 'Excel Pictures.'"

It was stipulated that defendant should not be liable for failure or delay in making deliveries by reason of accidents, strikes, fires, orders of court, rulings of the censor, delays of common carriers or other causes beyond its control.

It was further stipulated that in the event of illness, injury, incapacity, death or default of artists, contractors, or other persons or corporations engaged in the production of pictures to be distributed, or any other causes beyond its control, defendant would be excused from the performance of the contract, and would have the right to cancel the agreement upon 10 days' notice.

It was further stipulated in section 12 of the contract that "either party to this agreement may, by notice by registered mail, given within ten days after the exhibition of any motion picture in the exhibitor's theatre, limit this contract to two additional pictures and upon the delivery for exhibition of such additional motion pictures, this contract will terminate."

The foregoing stipulations are embodied in the printed form of contract. At the end the following was added in typewriting. "This contract is noncancelable until January 1st, 1921."

The other contract is the same in substance except that it provides for the furnishing of "Victory" pictures instead of "Excel" pictures.

It is alleged that on July 15, 1920, defendant requested plaintiff to surrender and cancel the contract, and, upon plaintiff's refusal, defendant commenced a course of conduct to annoy and harrass plaintiff, and on several occasions refused to furnish pictures as contracted for after plaintiff had advertised them. It is further alleged that the defendant refused to carry out its contract intentionally and with intent to injure and destroy plaintiff's business and the good will of his theatre. The complaint asks that defendant be enjoined from violating the provisions of said contract and that it be adjudged to specifically perform said con-

tract and the plaintiff have such other and further relief as may be equitable and just.

The answer alleged that, after entering into said contract, defendant was compelled to discontinue the production of further "Excel" or "Victory" pictures, by reason of the termination of contracts of employment of various motion picture actors in its employ. As to certain of the failures to produce films, it is alleged that the failure was due to inability to procure them and that there was no intentional failure to perform the contract.

On August 26, 1920, defendant gave notice of the termination of the contract, acting under section 12 thereof.

After a hearing, the court made an order enjoining defendant during the pendency of this action, or until further order of the court, from violating the provisions of the contracts. Defendant appealed from that order.

The appeal presents the one question whether it was error to enjoin the violation of these contracts.

Upon taking the appeal, defendant gave a supersedeas bond and continued to violate its contracts. The case has never been tried on the merits. No move was made to advance the appeal on the calendar, and now that it has been submitted there is but a remnant of the contracts left. Not only that, but ever since January 1, 1921, defendant has concededly had the option to cancel the contracts. The injunction has therefore ceased to be of much importance.

1. The process of injunction to restrain a threatened breach of a contract will not be readily resorted to, but it may be resorted to when necessary to prevent irreparable injury. 22 Cyc. 848; *Jesse L. Lasky F. P. Co. v. Celebrated Players' Film Co.* 214 Fed. 861. The matter rests in large measure in the discretion of the trial court. *Chicago Municipal Gas Light and Fuel Co. v. Town of Lake*, 130 Ill. 42, 22 N. E. 616. When an injunction necessarily requires the doing of affirmative acts in performing the contract, the relief will be sparingly granted, but the court has power to prevent irreparable injury by issuing mandatory injunctions in such cases. *Southern Ry. Co. v. Franklin & Pittsylvania R. Co.* 96 Va. 693, 32 S. E. 485, 44 L.R.A. 297; *Witkowsky v. Affeld*, 283 Ill. 557, 119 N. E. 630; *Chester & D. T. Road Co. v. C. D. & P. Ry. Co.* 217 Pa. St. 272, 66 Atl. 358.

2. Construing these contracts we hold: The trial court was right in holding that the contract could not be canceled prior to January 1, 1921. The language of the last paragraph is explicit on that point and it is controlling. The trial court was right in holding that the contract obligated the defendant to produce in the one case "Excel" pictures and in the other case "Victory" pictures, unless excused for the causes stipulated in the contracts, and that it could not rid itself of this obligation by arbitrarily abandoning the brand or changing the names of its pictures.

The acts of defendant in violation of its contracts were apparently done under a belief of its legal right to cancellation of the contracts. Though the injunction may have impliedly required defendant to do some affirmative acts, we think there was no error or abuse of discretion in enjoining violation of the contracts.

Order affirmed.

HOLT and DIBELL, JJ. (dissenting).

In our judgment the facts do not make a case for a mandatory temporary injunction.

ELIZABETH CHANCE v. CHARLES HAWKINSON AND
ANOTHER.¹

May 13, 1921.

No. 22,202.

Appeal and error — what reviewable.

1. The record does not show a consolidation of two actions as claimed by plaintiff, and the appeal brings for review the judgment in one.

Same.

2. In the absence of a settled case this court cannot review the action of the trial court in directing a verdict.

Exclusion of evidence — statute inapplicable.

3. There was no error under the facts stated in the opinion in ex-

¹Reported in 182 N. W. 911.

cluding evidence that a third person was in the naval service. The Soldiers' and Sailors' Civil Relief Act was without application.

Federal act does not apply.

4. The act of February 13, 1911 (36 St. 901), has no application to procedure in a state court.

State statute — adverse claims.

5. The plaintiff was deprived of no right given by Laws 1919 (Ex. Sess.) c. 5.

Action of ejectment in the district court for Hennepin county and to recover \$12,000 damages. The case was tried before Bardwell, J., who directed a verdict in favor of defendants. Plaintiff's motion for judgment notwithstanding the verdict or for a new trial, was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

H. K. Chance, for appellant.

C. M. Bleecker, for respondents.

DIBELL, J.

Elizabeth Chance brought an action to recover possession of real property in Minneapolis against the defendants Charles Hawkinson and wife. This action in the court below is No. 167,080. Harold K. Chance was afterwards substituted as plaintiff. His name has not been carried into the title. Harold K. Chance later brought an action against the same defendants and others involving the same property. This action in the court below is No. 168,511. The appeal is from a judgment in favor of the defendants.

1. The first mentioned action resulted in a verdict directed for the defendants and judgment was entered on November 15, 1920. The appeal is from that judgment and assumes to reach all intermediate orders, findings and judgments in both actions.

The plaintiff claims that the two actions were consolidated and that they are both for review. This is not the record. An examination of the papers returned shows that judgment was entered on June 18, 1919, in No. 168,511. The judgment in No. 167,080, entered November 15, 1920, purports to be upon a verdict rendered under direction of the court. No mention of the additional parties in the other action is made. Both numbers are indorsed on the judgment and are written at the top. There is no order consolidating the cases. Neither the court

nor the parties treated them as consolidated and they were not consolidated. This appeal reaches the judgment in No. 167,080, but not the judgment in No. 168,511.

2. There is no settled case. Apparently the substantial issue was whether Elizabeth Chance was married to one Oliver K. Chance at the time he made a mortgage upon homestead property, under the foreclosure of which the defendants claim title. She did not join, and if she was then his wife the mortgage was void. Without a settled case bringing to us the evidence before the trial court, we are unable to review the contention of the plaintiff that there was error in directing a verdict for the defendants. This is necessarily so, has been so held over and over, and there is nothing in the plaintiff's contention to discuss.

3. The court settled a part of the transcript of the testimony as a bill of exceptions. It appears from it that proof was rejected that Horace C. Chance was in the naval service. There is nothing to indicate error in this. The Soldiers' and Sailors' Civil Relief Act of March 8, 1918 (40 St. 440), does not apply. The mortgage had been foreclosed long before the statute and before the war. Horace C. Chance is not a party. It does not appear by any competent evidence that Harold K. Chance took title from him. If he did it was before the statute and the war. There is nothing in the record to show the materiality or competency of the proof rejected.

4. Were it not that plaintiff urges as if in earnest that the act of February 13, 1911 (36 St. 901), relating to Federal appeals, has application here, we would not mention it. We dispose of the claim by saying that the statute has no application at all to procedure in a state court. That a Federal question may be involved makes no difference. There is no room for argument.

5. Neither is there anything in the plaintiff's claim of a deprivation of a right given by Laws 1919 (Ex. Sess) p. 6, c. 5. The action is ejectment. It is not to determine adverse claims. There are not two plaintiffs. It is not within the terms of the statute. Whatever the proper application of the statute is, it is clearly without application here.

We have referred to all the points that need particular mention and to some which might well enough be passed without discussion. The plaintiff seems to claim something by virtue of the decision in Chance

v. Hawkinson, 140 Minn. 250, 167 N. W. 734. Even if that case were before us, the claim is groundless. The court there held, in accordance with a prior decision, that the proper registration tax was paid and nothing else. The foreclosure was not held invalid.

The plaintiff has not printed the paper book required by the rules. A mass of original records, including the judgment rolls in No. 167,080 and No. 168,511, and other original files in the court below, have been filed with the clerk of this court. Necessarily we have examined them to ascertain the real controversy and the actual questions presented for review. Counsel should not carry the impression that he is losing on a technicality. He had a trial below which resulted in the judgment. Just what occurred he has not chosen to present to this court for review. The trial court treated him with great patience and gave him every opportunity to procure a settled case. He persistently refused and relies wholly upon technical claims of no substance or merit. Everything reviewable on the record has been examined and the plaintiff has nothing of which to complain.

Judgment affirmed.

CITIZENS BANK OF MORRIS v. DAN MEYER AND OTHERS.¹

May 13, 1921.

No. 22,215.

Warranty deed — defeasance.

1. A warranty deed, containing a provision that the grantor may defeat it by paying a specified sum within a specified time, is to be given the effect intended by the parties at the time it was executed.

Intent of parties.

2. This intention is to be ascertained from the written instrument or instruments and the attendant facts and circumstances.

Conditional sale — mortgage.

3. A deed and an agreement to reconvey on payment of a specified

¹Reported in 182 N. W. 913.

sum is prima facie a conditional sale, but if the purpose be to secure a debt the transaction results in a mortgage.

Evidence of intent.

4. If no debt existed and the grantor assumed no obligation to make the specified payment, this is strong evidence that the parties intended the deed to take effect as a conveyance subject to an option in the grantor to reacquire the property.

Same.

5. The fact that after the execution of the deed the grantor paid no taxes or encumbrances against the land, exercised no act of ownership over it, and made no claim to it, and that the grantee took possession of it, paid the taxes and encumbrances on it, and sold and conveyed it as owner, is evidence that they intended the deed to operate as a conveyance.

Decision supported by evidence.

6. The evidence justified the trial court in finding that the instrument in controversy was a deed, not a mortgage, and vested title in the grantee subject to a right to repurchase.

Action in the district court for Stevens county to determine adverse claims to certain vacant and unoccupied real property. The case was tried before Flaherty, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Roberts & Strong and S. H. Cranmer, for appellants.

James B. Ormond and Murphy & Anderson, for respondent.

TAYLOR, C.

On October 18, 1905, Thomas W. McClean purchased the quarter section of land, containing 153.71 acres, described in the instrument hereinafter set forth, subject to a mortgage of \$2,500. At the time of purchasing the land he executed a second mortgage thereon in the sum of \$725 for part of the purchase price, and on November 25, 1905, executed a third mortgage thereon in the sum of \$702.70 to a bank at Cartersville, Iowa. There were no buildings or fences on the land, but a portion of it was under cultivation and McClean farmed this portion during the season of 1906. On December 18, 1906, McClean, his wife joining

therein, executed to Mathius Johnson, of Cartersville, Iowa, the following instrument:

"Know all men by these presents, That the grantors Thomas W. McClean and Annie McClean, his wife, residing in the Township of Scott, County of Stevens and State of Minnesota, for and in consideration of the sum of two hundred seventy-three and 53-100 dollars, to them in hand paid, do hereby convey and warrant to Mathius Johnson, as grantee, the following described real estate, viz:

"The southwest quarter of section eighteen, in Township one hundred twenty-three, in Range forty-three (subject to a first mortgage thereon for \$2,500.00 upon which the interest to December 1st, 1906 (\$150.00) and the interest thereon to the date hereof, is paid and included in the consideration above herein expressed, and subject also to a second mortgage for \$725.00 on which all interest to October 18, 1906, is paid and included in the consideration above herein expressed).

"(The execution and delivery of and the record of this deed is subject to be defeated by the payment by the said grantors, their heirs, executors, administrators or assigns within one year from the date hereof to the grantee herein, his heirs, executors, administrators or assigns, of the exact amount of the consideration above herein expressed (two hundred seventy-three and 53-100 dollars) together with interest thereon after the date hereof until paid at the rate of eight per cent per annum, together with and including whatever if anything during 1907, is paid, laid out and expended by the grantee herein as tax moneys.)

"Situate in the County of Stevens and State of Minnesota.

"Dated at Morris, Minn., this 18th day of December A. D. 1906.

"Thomas W. McClean. (Seal)

"Annie McClean. (Seal)"

This instrument was duly witnessed, acknowledged and recorded. It is the statutory form for a warranty deed with an additional clause providing that the deed may be defeated by the payment of a specified sum within one year.

McClean never occupied the land or made any claim to it after executing this deed, and never, at any time, paid any taxes on it, or any principal or interest on the encumbrances against it. He wholly abandoned it. Johnson took possession of the land under the deed, at what

time does not appear, and rented it to tenants, and he and those who took under his title have been in possession of it ever since. On December 30, 1908, Johnson executed two mortgages on the land—one for \$2,000 and one for \$850—and with the proceeds of these mortgages and other funds, provided by himself, paid and satisfied the three prior mortgages. On November 16, 1912, Johnson executed a warranty deed of the land to A. E. Goffe. Goffe executed two mortgages on the land—one for \$2,750 to plaintiff and one for \$1,250 to the Iowa bank—and the two mortgages given by Johnson were paid and satisfied. On February 28, 1913, Goffe executed a warranty deed of the land to John Walsh, and on March 1, 1913, Walsh executed a mortgage thereon for the sum of \$2,450 to E. P. Keenan and J. W. Clarey. On July 15, 1915, Walsh executed a special warranty deed of the land to defendant Hensch who took and still retains possession of it. The mortgage given by Walsh and the mortgage of \$1,250 given by Goffe have been foreclosed, and the title acquired thereunder has passed to and vested in the plaintiff.

Plaintiff invested its money in the land without any actual knowledge of the condition in the deed executed by McClean, and on learning thereof brought this action to determine adverse claims, making the widow and children of McClean defendants therein. The trial court found that the instrument executed by McClean to Johnson hereinbefore set forth "was an absolute warranty deed of the premises therein described, and that the said Mathius Johnson acquired an estate in fee simple thereunder; that the reservation contained in said instrument was a mere option giving the grantor, Thomas W. McClean, the right to repurchase the said premises within one year from the date thereof upon complying with the terms of said option; that the said Thomas W. McClean never exercised his rights thereunder, permitted the same to lapse and expire, and wholly abandoned the same."

Judgment was entered decreeing plaintiff to be the owner in fee of the land and defendants appealed.

Defendants rest their case on the contention that the instrument executed by McClean to Johnson was a mortgage, not a deed, and did not convey title to Johnson. They concede that, if this instrument conveyed title to Johnson, the title has vested in plaintiff under the mortgage

foreclosures, and that plaintiff was entitled to judgment. No question arose concerning the character or effect of this instrument until after the death of both the parties to it. McClean died in 1911; Johnson some years later. The instrument is a warranty deed from McClean to Johnson, with a provision added that the deed is subject to be defeated by the payment by the grantor within one year of the amount of the consideration stated in the deed, together with interest thereon at the rate of eight per cent per annum, and the taxes, if any, paid by the grantee during such year.

The cardinal rule in construing such instruments is to give them the force and effect intended by the parties at the time they were executed. *King v. McCarthy*, 50 Minn. 222, 52 N. W. 648; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Bradford v. Helsell*, 150 Iowa, 732, 130 N. W. 908; *Rich v. Doane*, 35 Vt. 125.

"In considering whether a transaction by absolute deed, and simultaneous bond or agreement for reconveyance, is a mortgage or a conditional sale, the important question is, what was the intention of the parties? Did they intend security or sale? This intention is to be ascertained by looking at the written memorials of the transaction, and its attendant facts and circumstances." *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95.

The written memorials of the transaction are to be given the same effect whether embodied in a single instrument or in several instruments. *Hill v. Edwards*, 11 Minn. 5 (22); *Holton v. Meighen*, 15 Minn. 50 (69); 1 *Jones*, Mort. 296. The attendant facts and circumstances to be taken into consideration in determining the intention have been pointed out many times and the inferences to be drawn from certain facts and circumstances are well established. A deed with an agreement to reconvey on being paid a specified sum is *prima facie* a conditional sale. *Buse v. Page*, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95; *Butman v. James*, 34 Minn. 547, 27 N. W. 66; *Marston v. Williams*, 45 Minn. 116, 47 N. W. 644, 22 Am. St. 719; *Wilson v. Fairchild*, 45 Minn. 203, 47 N. W. 642. Yet, if the purpose is to secure a debt, the transaction, regardless of its form, is generally, and perhaps universally, held to have resulted in a mortgage. But, if no debt existed and no loan was made, these facts are strong evidence that the parties did not intend to create

a mortgage, but intended to convey the land with a right in the grantor to reacquire it by complying with the specified conditions. *Rich v. Doane*, 35 Vt. 125; *Fridley v. Somerville*, 60 W. Va. 272, 54 S. E. 502; *Becker v. Howard*, 75 Wis. 415, 44 N. W. 755; *Hershey v. Luce*, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6; *Little v. Braun*, 11 N. D. 410, 92 N. W. 800; *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131; *Weltner v. Thurmond*, 17 Wyo. 268, 98 Pac. 590, 99 Pac. 1128, 129 Am. St. 1113; *King v. McCarthy*, 50 Minn. 222, 52 N. W. 648.

In *Wilson v. Fairchild*, 45 Minn. 203, 47 N. W. 642, one Hanson conveyed a town lot to the plaintiff, and the plaintiff agreed in writing to sell the lot back to Hanson within one year for \$165 and interest at 10 per centum and the taxes paid. The court said that the deed "was not a mortgage, for it does not appear to have been executed as security, and it is of the essence of a mortgage that it be intended as security," and held that the transaction was a conditional sale and that the title passed to the plaintiff. The fact that the grantor reserved the right to reacquire the land at a specified price, but assumed no obligation to pay the price, indicates that the parties intended the title to pass to the grantee, subject to the option retained by the grantor. *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131; *Fridley v. Somerville*, 60 W. Va. 272, 54 S. E. 502; 20 Am. & Eng. Enc. (2d ed.) 942, and cases there cited.

The subsequent conduct of the parties is often persuasive evidence of what they intended to accomplish by the transaction. Among the circumstances held to be evidence that they intended to convey the title instead of creating a mortgage are the following: That the grantor relinquished possession; that he allowed a long period of time to elapse without asserting a claim to the land or exercising any act of ownership over it; that he paid no taxes or encumbrances; that the grantee took possession and exercised dominion over the land as owner; that he paid taxes and encumbrances, and that he sold and conveyed the land as owner. *Hesser v. Brown*, 40 Wash. 688, 82 Pac. 934; *Rich v. Doane*, 35 Vt. 125; *Becker v. Howard*, 75 Wis. 415, 44 N. W. 755; *Hart v. Randolph*, 142 Ill. 521, 32 N. W. 517; *Gray v. Hayhurst*, 157 Ill. App. 488; *Fridley v. Somerville*, 60 W. Va. 272, 54 S. W. 502; *Way v. Mayhugh*, 57 W. Va. 175, 50 S. E. 724; *LaCotts v. LaCotts*, 109 Ark. 335, 159 S. W. 1111; *Bradford v. Helsell*, 150 Iowa, 732, 130 N. W. 908.

In the present case it was stipulated that the land was worth \$25 per acre when McClean executed his deed. Consequently the small consideration expressed in the deed does not give rise to an inference that the transaction was intended as a mortgage, for the total value of the land at that time was less than the amount of the mortgages then against it. Defendants suggest that the deed was given for past due interest on these mortgages, but the facts do not warrant such an inference. The three mortgages were held by three different parties. Johnson held none of them, and, so far as the record shows, never had any interest in any of them, either personally or as the representative of others. If the relation of debtor and creditor had existed between McClean and Johnson, and an existing indebtedness had entered into the consideration for the deed, this would have been a circumstance pointing to a mortgage. But there is no evidence that McClean had ever been indebted to Johnson, or that they had ever had any other transactions of any sort with each other. If McClean had obligated himself to make the payment necessary to defeat the conveyance, that would also have been evidence that the deed was intended as security. But McClean in no way obligated himself to make this payment. The deed contains no such obligation, and the deed is the only evidence in the record showing, or tending to show, the transaction between these parties. The only other evidence tendered relating to this matter was an offer to prove by Mrs. McClean that she had heard a conversation between her husband and Johnson to the effect that the deed was given as security for the sum of \$273.53 due the Iowa bank which was to be paid within one year, but this testimony was necessarily excluded under the statute which forbids a party to an action from testifying concerning a conversation with a deceased person relating to the matters in controversy.

The absence of facts or circumstances tending to characterize the transaction as a mortgage; the existence of the situation usually found where the transaction is intended as a conveyance with the reservation of an option to the grantor to reacquire the property on certain specified terms; and the subsequent conduct of the parties showing that both understood that the title had passed to and vested in Johnson, amply justified the finding of the trial court. The fact that the land is now worth

\$75 per acre, three times its value at the time of the transaction, serves to explain why the present controversy has arisen. The judgment appealed from is affirmed.

STATE EX REL. J. S. SAARI AND ANOTHER v. STATE SECURITIES COMMISSION OF MINNESOTA.¹

May 13, 1921.

No. 22,252.

Appeal and error — scope of review of action of Securities Commission.

In reviewing the action of the State Securities Commission denying an application for a certificate authorizing a state bank to transact business, this court cannot interfere, unless it appears that the commission failed to keep within its jurisdiction or proceeded on an erroneous theory of the law or acted arbitrarily, oppressively and unreasonably, so that its determination represents its will and not its judgment, or is without evidence to support it. The facts disclosed by the evidence recited in the opinion do not warrant the conclusion that the commission exercised arbitrary power instead of its candid judgment in denying the application.

Upon the relation of J. S. Saari and others the supreme court granted its writ of certiorari directed to the State Securities Commission to review its order denying the application of relators for a certificate authorizing a bank to transact business in the village of Gilbert. Affirmed.

Christofferson, Christofferson & Jackson and *O. J. Larson*, for relators.

Albin E. Bjorklund, for respondent.

LEES, C.

Certiorari to review an order of the State Securities Commission denying the application of J. S. Saari and others for a certificate authorizing a state bank to transact business in the village of Gilbert.

The commission found that there was no reasonable public demand

¹Reported in 182 N. W. 910.

for the proposed bank, and that the probable volume of business in Gilbert did not appear to be sufficient to insure and maintain the solvency of the proposed bank and of the existing bank. The order denying the application accordingly followed and is challenged on the ground that it is arbitrary, oppressive, unreasonable, and not the result of an impartial judgment based on the evidence, which we will summarize:

About 3,500 people live in Gilbert and about 2,500 in the territory which in some degree is tributary to Gilbert for business purposes. Within or close to the village there are several iron mines employing many miners. There are some small farmers living nearby. The combined annual payroll of the mines is about \$2,700,000. The public schools in or near Gilbert employ about 100 teachers, whose annual salaries aggregate approximately \$240,000. The assessed valuation of the village is \$5,840,000, and, if all the banking territory of the village is included, the valuation is over \$8,000,000. There is but one bank, the First National. It has a capital of \$30,000 and a surplus of \$25,000. Its average deposits aggregate \$500,000 or more. Virginia and Eveleth are large prosperous towns within a few miles of Gilbert, with excellent communications by steam railway, trolley and public highways. More than \$100,000 is deposited in banks in these two towns by people who live in or transact business at Gilbert.

The organizers of the proposed bank include 13 business men from Gilbert, seven from Eveleth, three from McKinley and one from Virginia, also two farmers, five laborers, and one miner, living near Gilbert. Mr. Saari is the president of a state bank at Eveleth. One of his associates is cashier of this bank and another was formerly cashier of a bank at Virginia. It was proposed to organize the new bank with a capital of \$25,000 and a surplus of \$7,500.

In 1912 there were two banks at Gilbert, the First National and a state bank, with combined deposits of upwards of \$250,000. In that year the First National absorbed its rival. It now has 1,200 or 1,300 depositors. There is no direct evidence of dissatisfaction with the banking facilities it affords or with its treatment of patrons. Dissatisfaction may be inferred from the fact that it has declined to cash a portion of the outstanding village orders, of which there are many, and that a majority of the organizers of the proposed rival bank are residents of

Gilbert and presumably present patrons of the First National. The annual dividend rate of the First National up to 1913 was 6 per cent. From then until some time in 1916 it paid no dividends. From 1916 until the beginning of 1919, its dividend rate was 6 per cent and since then has been 8 per cent. There is some evidence that the mines at Gilbert are curtailing operations and that the village is not growing. There is also evidence to the contrary. It was shown that at a cost of \$50,000 the First National Bank has recently constructed a building for its exclusive use. We have not attempted to refer to everything disclosed by the evidence. These are its salient features, and from a consideration of them the commission came to the conclusion already stated.

Counsel for the relators make a vigorous attack on the findings. They contend that an impartial consideration of the undisputed evidence will demonstrate that the commission acted arbitrarily and capriciously in denying the application, and that the opposition has been worked up by the officers of the First National Bank in order to retain the monopoly of the banking business in Gilbert, which it has enjoyed since 1912. On the other hand, counsel for the respondents insist that the evidence shows that Mr. Saari and his immediate associates are seeking to create an artificial demand for another bank, which is neither needed nor wanted at Gilbert, and that there is no genuine local sentiment in favor of its establishment.

Our examination of the record has led us to conclude that the real controversy is over the inferences which may properly be drawn from the evidence. In a review of the action of the commission, the field of inquiry is limited. We do not have the same latitude as in reviewing judicial proceedings. Responsibility for the findings of fact rests on the commission. Though we may not agree with its conclusions, we cannot interfere, unless it appears that it has not kept within its jurisdiction or has proceeded upon an erroneous theory of the law, or has acted arbitrarily, oppressively and unreasonably, so that its determination represents its will and not its judgment, or is without evidence to support it. *State v. State Securities Commission*, 145 Minn. 221, 176 N. W. 759. The evidence would have justified findings contrary to those made, but is not so inconsistent with them as to warrant us in holding that the com-

mission exercised arbitrary power instead of its candid judgment in denying the application.

Order affirmed.

WILLARD I. LAIRD v. FLORENCE EUGENIA LAIRD.¹

May 20, 1921.

No. 22,046.

Divorce — residence of plaintiff.

1. The record sustains the finding that the plaintiff had been a resident of Minnesota for a full year before the commencement of the action.

Same — vacation of final decree.

2. A final judgment in an action for divorce cannot be vacated on the ground that the defendant failed to answer through mistake or excusable neglect.

Action for divorce in the district court for Steele county. The case was tried before Childress, J., who made findings and granted plaintiff absolute divorce. From an order denying defendant's motion to set aside the judgment of divorce and for leave to answer, defendant appealed. Affirmed.

James P. McMahon, for appellant.

A. W. & F. W. Sawyer, for respondent.

TAYLOR, C.

This is an appeal from an order refusing to set aside the judgment and permit the defendant to answer in an action for divorce.

The action was brought by Willard I. Laird in the district court of Steele county in this state. The summons and complaint were served on Mrs. Laird personally in the city of Chicago, Illinois, on April 26, 1916. She took them to an Illinois attorney and had him bring an action in her behalf in that state for a separate maintenance, and procure a tem-

¹Reported in 182 N. W. 955.

porary injunction from the Illinois court restraining Mr. Laird from prosecuting the divorce action in Minnesota during the pendency of the Illinois action. The Illinois action was tried in the latter part of 1917, and resulted in a judgment, rendered in the early part of January, 1918, granting Mrs. Laird the sum of \$85 per month for her maintenance, and vacating the injunction restraining Mr. Laird from prosecuting the divorce action. Thereafter, he brought the divorce action to a hearing, and on February 23, 1918, a judgment was rendered therein granting him an absolute divorce. This judgment also provided for paying Mrs. Laird the sum of \$85 per month as alimony, the same amount allowed her for maintenance by the Illinois court. Mrs. Laird never appeared in the divorce action in any manner at any time. The \$85 per month has been paid to and received by her regularly ever since it was awarded to her. On June 19, 1919, Mr. Laird married again, at Owatonna in Steele county, and ever since has been living with his second wife. On March 26, 1920, notice of a motion to vacate the judgment of divorce was served on him. From the denial of this motion the present appeal is taken.

The only matter of any merit presented in support of the motion is the claim that Mr. Laird was not a bona fide resident of the state of Minnesota. The court found as a fact that he had been a resident of this state for a full year immediately before the commencement of the action and this finding is well sustained by the record.

The defendant also asked to have the judgment vacated and for permission to answer, on the ground that her failure to answer was due to mistake and excusable neglect, but the statute permitting the vacation of a judgment on that ground does not apply to a final judgment in an action for divorce. G. S. 1913, § 7786. Moreover her claim in that respect is clearly shown to be unfounded.

Order affirmed.

C. W. JOHNSON v. UNION INVESTMENT COMPANY.¹

May 20, 1921.

No. 22,153.

Conveyance in fraud of creditors — verdict sustained.

1. In an action where the issue was whether a conveyance to the plaintiff was in fraud of the creditors of his grantor, of whom the defendant was a judgment creditor, it did not conclusively appear that the indebtedness represented by the judgment docketed after the conveyance existed at the time of it, and a finding of the jury that it did not, and that the defendant was a subsequent creditor, is sustained by the evidence.

When conveyance is fraudulent as to subsequent creditors.

2. A conveyance may be fraudulent as to subsequent creditors, as when its purpose and effect is to defraud creditors whom it is expected the grantor will have, or when the conveyance is really in trust for the use of the grantor and is intended as a cover. The evidence was not such as to require a finding that the conveyance to the plaintiff was fraudulent as to the defendant, a subsequent creditor.

Action in ejectment in the district court for Swift county and to recover \$800 for rents and profits, use and occupation of the property. Defendant in its answer alleged that there was a prior action pending involving the same issues. The case was tried before Qvale, J., who at the close of the testimony denied motions by both parties for a directed verdict, and a jury which returned a verdict that plaintiff was owner of the property and for \$500 for its use and occupation. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Jesse Van Valkenburg and Charles B. Elliott, for appellant.

H. E. Fryberger and Hudson & Hudson, for respondent.

DIBELL, J.

Action of ejectment. There was a verdict and judgment for the plaintiff. The defendant appeals.

¹Reported in 182 N. W. 955.

The defendant claims title under an execution sale against the grantor of the plaintiff. The judgment was docketed after the conveyance. The question is whether the conveyance was fraudulent as to the defendant, a creditor of the plaintiff's grantor.

1. Pulver, the owner, conveyed a quarter section in Swift county to the plaintiff, Johnson, on January 9, 1913. Defendant obtained judgment in Hennepin county against Pulver for \$11,678.48 on June 3, 1915. The land was attached on June 13, 1914. The judgment was reduced by payments to \$8,361.24. On February 27, 1917, a transcript was docketed in Swift county. The defendant purchased the land at the execution sale on July 11, 1917. There was no redemption. The defendant has no title, unless the conveyance from Pulver to the plaintiff was fraudulent. If it was fraudulent as to the defendant, it has title.

The action in which the judgment was rendered was commenced in May, 1913. An amended complaint was filed in May, 1914. It sought a recovery on notes aggregating some \$25,000. Payments were made after suit. On June 1, 1915, the parties stipulated for judgment for \$11,678.48. There was collateral which it was agreed should be applied when collected, and collateral so applied reduced the judgment to \$8,361.24. Two of the notes in the amended complaint were dated on November 12, 1912. The others were dated after the date of the transfer from Pulver to Johnson.

The judgment was conclusive of the indebtedness at the time of its rendition. It did not prove the existence of a debt on January 9, 1913, the date of the conveyance from Pulver to Johnson. The burden was on the judgment creditor alleging fraud to prove that the debt antedated the conveyance. *Irish v. Daniels*, 100 Minn. 189, 110 N. W. 968; *Schmitt v. Dahl*, 88 Minn. 506, 93 N. W. 665, 67 L.R.A. 590.

It is alleged as error that the court submitted the question whether the defendant's judgment represented a debt existing at the time of the conveyance to the plaintiff. The evidentiary facts involved in a solution of the question are confusing. Counsel for the plaintiff urges that it conclusively appears that none of the indebtedness antedated the conveyance, and counsel for the defendant with equal earnestness contends that it conclusively appears that all of the indebtedness existed on January 9, 1913. Of course the mere renewal of notes then existing did not pay

the indebtedness which they represented.

After going over the evidence with all possible care, we are unable to say that it conclusively appears that the indebtedness antedated the conveyance. The evidence sustains a finding that none of it did. There was no error against the defendant in leaving the question to the jury.

2. The defendant, then, is in the position of a subsequent creditor. A conveyance may be fraudulent as to subsequent creditors. The purpose and effect of a conveyance may be to defraud subsequent creditors, and if so it will be adjudged fraudulent. *Sovell v. County of Lincoln*, 129 Minn. 356, 152 N. W. 727; *Williams v. Kemper*, 99 Minn. 301, 109 N. W. 242; *Fullington v. Northwestern I. & B. Assn.* 48 Minn. 490, 51 N. W. 475, 31 Am. St. 663; *Walsh v. Byrnes*, 39 Minn. 527, 40 N. W. 831. And the conveyance may be made really for the use of the grantor upon a secret trust or understanding that he shall have the benefit of the property, in which event it is fraudulent as to subsequent creditors. *Wetherill v. Canney*, 62 Minn. 341, 64 N. W. 818; *Anderson v. Lindberg*, 64 Minn. 476, 67 N. W. 538. Pulver's testimony was that the property was deeded to Johnson to secure the support of his (Pulver's) crippled daughter, then a young child, who has since died. Pulver was not well at the time and feared unfavorable results. He testified that he was indebted to the plaintiff in an uncertain sum at the time. The plaintiff was his cousin. His story did not greatly impress the trial court. It was not so incredible that a jury could not believe it, and the trial court did not think that a new trial should be granted in the exercise of its discretion. The jury might have found that Pulver's financial condition at that time, as he understood it, was not at all bad, and that he might as to future creditors make a provision for his daughter, or might make a gift, and it was not required to find that the conveyance to the defendant was only a cover. It may be noted that Pulver claims that before the deed was made he talked over with the officers of the defendant the making of it and its propriety and that the arrangement had their approval. The evidence did not require a finding of fraud.

Judgment affirmed.

STATE v. JAMES B. PENNINGTON AND ANOTHER.¹

May 20, 1921.

No. 22,207.

Homicide — one verdict sustained — one verdict not sustained.

1. The evidence sustains the verdict finding the defendant Rauslange guilty of murder in the second degree, but it is insufficient to sustain the verdict against the defendant Pennington.

Admissibility of evidence.

2. No error occurred in the admission or exclusion of evidence of which defendant found guilty is in position to complain.

Corroboration of accomplice — question not reviewable.

3. Defendants were not entitled to an instruction that Stoppler, jointly indicted with them but a witness for the state, was an accomplice. And since there was no request for an instruction that, should Stoppler be found an accomplice, there must be an acquittal for lack of corroborating testimony, the question of the presence or absence of such testimony is not here for review.

Charge to jury.

4. The instructions of the court were full, clear and fair both to the state and to the defendants.

James B. Pennington and Peter Rauslange were indicted by the grand jury of Anoka county charged with the crime of murder in the first degree, tried in the district court for that county before Giddings, J., and a jury and convicted of murder in the second degree. From an order denying their motion for a new trial, defendants took separate appeals. Affirmed as to defendant Rauslange. Reversed as to defendant Pennington.

Brady, Robertson & Bonner, for appellants.

Clifford L. Hilton, Attorney General, *Albert F. Pratt*, *James E. Markham*, Assistant Attorneys General, and *Will A. Blanchard*, County Attorney, for respondent.

¹Reported in 182 N. W. 962.

HOLT, J.

Early on October 25, 1918, a man was found dead at a haystack within less than a mile from the easterly city limits of Anoka. The haystack was about 70 feet north of a road running east and west called Main street road. The ground indicated a struggle and the crushed skull clearly proved that some one had inflicted a fatal wound. J. B. Pennington, Peter Rauslange and Lorenz Stoppler were indicted, and the two first named, tried together, were convicted of murder in the second degree and sentenced. Each appeals from the order denying his separate motion for a new trial.

The errors assigned are by appellants discussed under the heads: (1) the evidence is insufficient to support the verdict; (2) errors in the admission of prejudicial testimony; and (3) errors in the charge.

Who the dead man was has never been ascertained. That his life was feloniously taken is conceded. The disputed proposition is defendants' connection with the crime. Pennington, 52 years of age, owned a sedan car which he used as a taxicab in Minneapolis. Rauslange, 46 years old, who will be referred to hereafter as Miller, the name he generally was known by, worked around saloons, and usually roomed over them. The two defendants became acquainted when both were serving sentences at the Minneapolis workhouse for liquor law violations. Thereafter they frequently associated, taking women out for joy rides, and to some extent drinking together.

The theory of the state was that Miller met Stoppler in the afternoon on October 24, 1918, and, while drinking with him, concluded that he had some money which it was worth while to obtain, and, when the company of some girls suggested itself, Miller conceived the plan to take a taxicab ride out in the country, ostensibly to gratify Stoppler's desire, but in reality for the purpose of robbing him; that to that end Pennington was engaged to take them out to Bertha, Minnesota, a place some 30 miles north of Long Prairie, the home of one Edith with whom Miller associated; that Miller told Stoppler that the place was but 18 miles out in the country; that the party left Minneapolis at about 11 o'clock in the evening, and on the road to Anoka picked up a confederate of the defendants, the man killed; that, when Stoppler became dead to his surroundings, he was robbed of his watch and \$320 in bills which

he carried concealed upon his person, and that the confederate, the dead man, and Miller became involved in a dispute over the spoils, and in the altercation Miller gave the blows that caused the death.

It is not our purpose to give a resume of the evidence, but only to state the more conspicuous circumstances which tend to connect defendants with the crime.

From the testimony of the physician who conducted the post mortem the jury could find that the crime was committed shortly after 2 o'clock in the morning of the twenty-fifth; that, at 1:43 a. m. that day, defendants inquired the way to Bertha of one Hoyt, a farmer, living $5\frac{1}{2}$ miles south of Anoka; that not far from that time an automobile stopped a few minutes near the haystack mentioned and then proceeded rapidly toward Anoka; that at 2:35 a. m. defendants stopped at the mill in Anoka and inquired the road to Bertha; that they exhibited nervousness when they arrived at the home of Edith's sister, near Bertha; that when arrested at Long Prairie, after being informed that the chief of police at Anoka had been killed, Miller told Stoppler it was not the chief of police, and that defendants then cautioned Stoppler to stick to his story that he had been robbed before they started on the trip, for, if he did, they would be freed at Anoka and he would get his money back. Also, that after the preliminary hearing Miller told Stoppler that the dead man was trying to kill him, Stoppler, and that he, Miller, would not let him; that the dead man had got \$120 of Stoppler's money; that in the fracas the door of the car was slammed on Miller's hand, and then he hit the man twice, but did not expect him to die; that the man was a crook and safe blower; that the altercation took place outside the car, and that Pennington was not out of the car at all.

Stoppler also testified that afterwards Miller said they just took him, Stoppler, out to rob him. In corroboration of the robbery there was evidence that Miller had no money when they started, but had money to spend when they got to St. Cloud; that he did not carry a watch, but when asked the correct time at the home of Edith's sister he had one, and that in a little pocket inside the coat pocket of the dead man were found \$136 in bills, one of which was a one hundred dollar bill, and one a twenty dollar bill. Stoppler testified that the money of which he was relieved consisted of two one-hundred, two fifty, and one

twenty-dollar bills. It is readily seen that, if the jury accepted Stoppler's story of the robbery and of Miller's confession as true, the verdict as to the latter is justified, even though there were many circumstances that might seem to discredit both. The jury could find a design to effect death from the force and brutal manner in which the blows were evidently struck by a deadly bludgeon or weapon. *Rosemond v. State*, 86 Ark. 160, 110 N. W. 229.

But as to Pennington the situation is different. The only thing connecting him with any admission of guilt is that, at Long Prairie, after their arrest, he heard Miller tell Stoppler to keep quiet about his being robbed on the trip and they would all be freed, and also he, Pennington, then told Stoppler the same thing. The admissions by Miller, after the preliminary hearing of his connection with the killing, were not made in the presence of Pennington, and, as correctly ruled by the learned trial court, could not be made use of against him. Nor were these admissions of Miller made by a coconspirator under such circumstances as to be admissible against Pennington, for they were made long after the commission of the crime. But, even were it otherwise, Miller's statements exculpate Pennington. Taking the whole of the state's case, including all of Stoppler's testimony, we think no jury justified in connecting Pennington with the killing other than as an accessory after the fact, in that he aided Miller to escape. But as such he could be indicted and tried only under section 8479, G. S. 1913, as the court correctly charged the jury.

That there existed a conspiracy or tacit understanding between Pennington and Miller to harm or take the life of the dead man, is negatived by Miller's statement of the affair to Stoppler, and is wholly out of harmony with the theory of the prosecution, which was that the one killed was a confederate, taken along to help rob Stoppler. Miller's confession contains no suggestion that Pennington, either directly or indirectly, induced, encouraged, or counseled Miller to strike their companion. There is no foundation for a claim that defendants had conspired to either rob or harm their confederate, the dead man. Pennington made no attempt to obtain any money from the victim. This case is readily distinguishable from *State v. Shea*, 148 Minn. 368, 182 N. W. 445, where the evidence was clear that Shea, after knowledge that Reden-

baugh had slain Mrs. Dunn for an agreed reward, eagerly sought and secured a share thereof. This was persuasive proof that he aided and abetted the crime committed in his presence. The jury were properly instructed touching every issue bearing upon the guilt or innocence of defendant Pennington, but a careful examination of the record leads to the conclusion that the evidence wholly fails to prove him guilty of the crime of which he stands convicted.

It will therefore not be necessary to refer to other assignments of error relating to his appeal, except to say that no error was committed in showing the intimacy existing between the two defendants, and that the story of the Larson deal, so called, was properly stricken from the record. If any evidence improperly crept in from the testimony of the shorthand reporter, who was present and took notes when defendants were questioned by the county attorney soon after their arrest, the error was clearly waived by defendants' attorney. We find no error in the rulings of the court as to which Miller may justly complain.

It is claimed that there was no sufficient corroboration of Stoppler, an accomplice. There is no merit in this claim. The court submitted the question of Stoppler's complicity to the jury under proper instructions, and the evidence amply warrants the conclusion that he was not an accomplice. The jury could well find that from drink or drug Stoppler became so dead to the world before the party left Minneapolis that he never realized that a fourth man joined them. There was no request or suggestion for an instruction to the effect that, if Stoppler was found to be an accomplice, there must be an acquittal because of the lack of sufficient corroborative evidence. Hence the question of the sufficiency of the corroboration is not for review.

The charge of the court is said to set forth too prominently and argumentatively the claims of the state. The criticism appears to us unfounded. The learned trial court clearly, amply and impartially stated the issues and the applicable rules of law to the jury, and the contentions of defendants were distinctly brought to the attention of that body. Exception is taken to that part of the charge which refers to the fact that defendants had testified, and stating that, in weighing their testimony, the jury were to apply the same rules that had been given for weighing the testimony of witnesses generally. This is accurate enough,

but the reference to defendants might with more propriety have been omitted.

The result of a careful examination of the whole record is that there is sufficient evidence to support the conviction of defendant Peter Rauslange alias Peter Miller, and that no error was made in any ruling or in the charge of which he may justly complain, but that as to defendant Pennington the evidence is insufficient to sustain the conviction.

Therefore the order is affirmed on the appeal of Peter Rauslange, and reversed on the appeal of J. B. Pennington and a new trial granted to him. And the warden of the state prison at Stillwater is hereby directed to surrender said Pennington to the sheriff of Anoka county, on his application, who will return him to that county for trial.

CARL CARLSON v. AMERICAN FIDELTY COMPANY.¹

May 20, 1921.

No. 22,213.

Workmen's Compensation Act — effect of insurer's undertaking that of supersedeas bond.

1. In proceedings under the Workmen's Compensation Act an injured workman recovered a judgment against the insurer of his employer. A writ of certiorari was issued to review the judgment, and to obtain the writ defendant executed an undertaking conditioned as a supersedeas bond under section 8004, G. S. 1913. *Held*, that the undertaking obligated the surety for defendant to pay the judgment and not merely the costs and damages.

Surety bound by terms of his undertaking.

2. The fact that, by the execution of an undertaking so conditioned, the plaintiff gained an advantage to which he may not have been entitled, does not relieve the surety from the liability expressed in the undertaking. The undertaking may be enforced as a common law obligation, although its conditions are more onerous than would have been required if a statutory bond had been given to effect the same purpose.

¹Reported in 182 N. W. 985.

Surety liable for unpaid instalments.

3. The judgment was payable in weekly instalments and such instalments were paid until and after the judgment was affirmed and the case remanded to the district court. *Held*, that the surety on the undertaking nevertheless remained liable for the payment of the remainder of the judgment.

After the former appeal reported in 133 Minn. 439, 158 N. W. 700, the case was tried before Comstock, J., who denied defendant's motion for dismissal of the action and granted plaintiff's motion for a directed verdict in his favor for \$1,197. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

Ernest E. Watson, for appellant.

Ivan Bowen and Leroy Bowen, for respondent.

LEES, C.

In proceedings under the Workmen's Compensation Act in the district court for Blue Earth county, plaintiff, on January 14, 1916, recovered a judgment against the Casualty Company of America, the insurer of his employer. This court entered an order granting a writ of certiorari to review the judgment, and upon such review the judgment, on July 7, 1916, was affirmed. *State v. District Court of Blue Earth County*, 133 Minn. 439, 158 N. W. 700. The order directed the casualty company to execute a bond in the sum of \$4,000, with an approved surety, the bond to be "in the form of a supersedeas bond upon an appeal from a judgment." In compliance therewith, an undertaking was executed by the defendant in this action, running to the plaintiff, and conditioned as follows:

"If the judgment of the District Court of Blue Earth County so to be reviewed as aforesaid, or any part thereof is affirmed, that the Casualty Company of America, the defendant in said action, will pay the amount directed to be paid by the said judgment, or the part thereof which is affirmed, if it is affirmed only in part, and all damages awarded against the defendant upon the appeal, provided, however, that its liability hereunder shall not exceed the sum of four thousand (\$4,000.00) dollars."

The judgment of the district court awarded plaintiff compensation for 400 weeks at the rate of \$9 a week, payable weekly from and after June 2, 1915. Such compensation was paid by the casualty company for a period of 99 weeks, or from June 2, 1915, to April 25, 1917. On May 4, 1917, the casualty company became insolvent. On September 21, 1917, an execution was issued to enforce the judgment, and on the following day it was returned wholly unsatisfied. Thereafter plaintiff sued on the undertaking to recover the unpaid portion of the judgment. The defense was that payment of the compensation awarded had been made up to and after the time when this court affirmed the judgment; that defendant was not liable for the payment of compensation thereafter; and that, when the casualty company became insolvent, plaintiff's remedy was an action against his employer. In short, defendant took the position that the benefit of the judgment was not lost to plaintiff by reason of the stay which followed the issuance of the writ, but was lost by reason of the insolvency of the casualty company, which did not occur until nearly a year after the stay was vacated by the affirmance of the judgment and the remand of the case to the district court. A jury was impaneled, and, the facts above related being admitted, defendant moved for a dismissal of the action and plaintiff countered with a motion for a directed verdict in his favor. The court granted plaintiff's motion and directed the jury to return a verdict for \$1,197 as compensation for 133 weeks at \$9 a week. Defendant thereafter moved in the alternative for judgment notwithstanding the verdict or for a new trial, and appeals from an order denying both motions.

The statute relating to certiorari contains a section reading: "Each writ of certiorari * * * shall be endorsed by some responsible person as surety for costs." Section 8315, G. S. 1913. When there is an appeal from a money judgment, the statute directs that the appeal shall not stay execution, unless a bond is executed conditioned that if the judgment is affirmed the appellant will pay the amount directed to be paid by the judgment and all damages awarded against appellant on the appeal. Section 8004, G. S. 1913. On its face, the undertaking gave plaintiff the same security as he would have had if he had recovered an ordinary money judgment and defendant had appealed and obtained a stay of execution. It was a supersedeas bond in form, and hence, if

given effect according to its terms, it obligated defendant to pay the judgment and not merely the costs and damages. *Erickson v. Elder*, 34 Minn. 370, 25 N. W. 804; *Stiles v. American Surety Co. of New York*, 143 Minn. 21, 172 N. W. 776. Conceding that it gave plaintiff more than the statute required, the fact remains that defendant saw fit to execute it voluntarily. The event has happened which transformed defendant's conditional promise into an absolute agreement to pay. Is there any valid reason why it should not be held to stand by its undertaking?

Defendant contends that plaintiff's status is no different than it would have been if the writ had not been issued. It seems to us that is begging the question. The condition upon which the writ was obtained was that the casualty company should furnish a supersedeas bond. Defendant, presumably for a consideration paid by the company, has executed such an instrument. The mere fact that plaintiff thereby gained an advantage, to which he may not have been entitled under the terms of the statute, is not a sufficient reason for permitting defendant to escape liability.

The undertaking itself, duly executed, is *prima facie* evidence that it was voluntarily entered into. It was founded on a sufficient consideration, intended to serve a lawful purpose, and was certainly a valid contract at common law. The doctrine sanctioned by this court is that: "A voluntary bond, other than an official bond, based upon a valid consideration, is enforceable as a common-law bond according to its conditions, although they are more onerous than would have been required if a statutory bond had been given to effect the same purpose." *Johnson v. Dun*, 75 Minn. 533, 78 N. W. 98; *First State Bank of M. L. v. C. E. Stevens Land Co.* 119 Minn. 209, 137 N. W. 1101, 43 L.R.A.(N.S.) 1040, Ann. Cas. 1914A, 1146. Illustrations of the application of the same doctrine may be found in the following cases: *U. S. v. Mora*, 97 U. S. 413, 24 L. ed. 1013; *Ring v. Gibbs*, 26 Wend. 502; *Hanna v. McKenzie*, 5 B. Mon. 314, 43 Am. Dec. 122; *Bowen v. Lovewell*, 119 Ark. 64, 177 S. W. 929.

We attach no importance to the fact that the amount awarded by the judgment was payable in weekly instalments. Under the compensation act, the judgment which is finally entered, has the same force and

effect as other judgments of the district court. Sections 8216, 8225, G. S. 1913. And see *Connelly v. Carnegie D. & F. Co.* 148 Minn. 333, 181 N. W. 857. The full measure of the casualty company's liability under the judgment was \$3,600, and the undertaking obligated defendant for the discharge of that liability. The language of the undertaking is plain. We may look to a statute to interpret a bond which purports to be executed in compliance with the statute when its meaning is doubtful, but when there is no doubt about the meaning of the phraseology there is nothing to interpret.

The suggestion is made that the undertaking was issued in its present form by mistake, and that this court should either correct the mistake or direct the court below to do so; that the purpose for which the undertaking was given has been accomplished and defendant should be released from further liability upon it. It is doubtful whether the undertaking may be reformed or canceled for either of the reasons suggested. The question is not now before us. It can only arise in case defendant sees fit to proceed by action in the district court to obtain relief of that sort. Its amended answer alleges no facts which would furnish a basis for either reformation or cancellation.

Affirmed.

MAUD BOWMAN v. SURETY FUND LIFE INSURANCE
COMPANY.¹

May 20, 1921.

No. 22,228.

Life insurance — waiver of right of forfeiture.

1. The insurance policy in suit is construed as not excepting a risk resulting from the insured entering military service in time of war without the written consent of the company, but as imposing in such event a condition which the company might waive if it chose, and that evidence that the company, after notice of the death of the insured in service, wrote the beneficiary in terms consistent with the view that the

¹Reported in 182 N. W. 991.

policy was in force and inconsistent with a claim of present forfeiture, and, as if it intended to pay, asked her to send formal notice of death, and later asked her to send formal proofs of death which she obtained with some trouble, justified a finding of waiver.

Acts of secretary of medical director binding on company.

2. The evidence sustains the finding of the jury that the acts claimed to constitute a waiver, which were done at the home office in the name of the company, by the secretary to the medical director, in response to correspondence, were corporate acts, and were not within the provision of the policy against waiver by an agent.

Action in the district court for Hennepin county to recover \$1,000 upon defendant's insurance policy. The case was tried before Fish, J., who when plaintiff rested and at the close of the testimony denied defendant's motion for a directed verdict and a jury which returned a verdict for \$1,080. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

John N. Berg, for appellant.

Cobb, Wheelwright & Benson and *C. E. Warner*, for respondent.

DIBELL, J.

Action on a policy of life insurance issued by the defendant to Kenneth R. Fletcher. The plaintiff, his mother, was the beneficiary. There was a verdict for the plaintiff, and the defendant appeals from the order denying its alternative motion for judgment or a new trial. The question is whether the evidence sustains a finding that the defendant waived the provision of the policy making it void upon the entry of the insured into military service in time of war.

1. The policy was issued on December 10, 1914. On March 11, 1918, Fletcher paid a premium which kept the policy in force for one year. On April 1, 1918, he entered military service, and in July, 1918, went to France, and on October 9, 1918, was killed in action. The plaintiff received from the war department on April 19, 1919, notice of his death. She wrote to the defendant, enclosing a copy of the message received from the war department, saying: "I am sending you a copy of a message received from the war department and this is the Kenneth R. Fletcher that is insured in your company under policy No. 16412.

He was taken in the draft on April first, 1918, and I thought it would be best to notify you." The copy enclosed showed that Fletcher was killed in action. In response the defendant wrote: "Acting on the information contained in your favor of the 30th ult., we are transmitting herewith blank for use in rendering legal notice of the death of a policyholder in this company. Be kind and answer the questions therein contained and return the notice to us at your earliest convenience. In closing permit us to extend to you our sympathy in your bereavement."

The plaintiff filled out the blank and forwarded it to the company. On May 12, 1919, the company acknowledged its receipt and transmitted blanks for furnishing final proofs of death. It said: "Legal notice of the death of the above mentioned policyholder having been received we now beg leave to transmit herewith blanks for furnishing final proofs of death. As it will be impossible to secure the attending physician's affidavit, we shall accept in lieu thereof the original notification of your son's death which you have received from the war department."

The plaintiff submitted the required proofs of death. Under date of May 27, 1919, and soon after the receipt of the final proofs of death, the company denied liability upon the ground that the insured was killed in action while engaged in military service. It relied upon a condition in the policy as follows: "MILITARY SERVICE AND NARCOTICS. This policy shall be void if the insured shall engage in army or naval service in time of war without the written consent of the company or shall become intemperate in the use of intoxicating liquors, chloral, cocaine or opium to the extent to impair the health of the insured."

The defendant claims that the provision quoted exempted it from liability. It cites *McCoy v. Northwestern Mut. Relief Assn.* 92 Wis. 577, 66 N. W. 67, 47 L.R.A. 681; *Elhart v. Pacific Mutual Life Ins. Co.* 47 Wash. 659, 92 Pac. 419; *Draper v. Oswego, C. F. R. Assn.* 190 N. Y. 12, 82 N. E. 755; *Ruddock v. Detroit Life Ins. Co.* 209 Mich. 638, 177 N. W. 242. These cases, except the one from Washington which appears otherwise differentiated from the one at bar, involve excepted risks. In the Michigan case, as stated in the application, "military or naval service in time of war is not a risk assumed under any policy hereunder applied for"; and by the policy such a risk was "not assumed by the company." The

New York case involved a fire loss coming from an excepted risk, and the Wisconsin case an exception of suicide as a risk. The view we take is that the condition was no more than the condition usual in policies relative to a change of occupation and was the subject of waiver. The defendant, with knowledge that the insured had died in military service, might choose to waive the provision for a forfeiture. The language of its letters justified a finding that such was its intent. It asked for proofs. The plaintiff furnished them and in doing so was put to some trouble. She obtained affidavits from witnesses residing at Sault Ste. Marie, Michigan, where she and her son had formerly lived, and furnished a certified copy of the original message from the war department, and made her own affidavit. She was living in Tarrytown, New York, at the time. The jury might well enough conclude that, until the final letter denying liability, the purpose of the defendant was to pay the policy in usual course, though it knew that the insured met death in military service. In *Mee v. Bankers Life Assn. of Minn.* 69 Minn. 210, 72 N. W. 74, it was said: "A waiver may be created by acts, conduct or declarations insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations which recognize and treat the policy as still in force, or induces the assured to incur trouble or expense, it will be regarded as having waived the right to claim a forfeiture."

The principle applied in *Hendrickson v. Grand Lodge A. O. U. W.* 120 Minn. 36, 138 N. W. 946, is substantially controlling. Waiver was there defined as "an intentional relinquishment of a known right." And there, as in this case, the company after death and with knowledge of the ground of forfeiture requested and received proofs of death. The conduct of the defendant evidenced a purpose to pay, was consistent with the continuance of the policy in force and inconsistent with a forfeiture, and justified the jury's finding of a waiver.

2. This condition was attached to the policy: "POWER OF AGENTS. No agent of this company has power to change this contract, waive forfeiture, extend credit or grant permits."

The letters sent by the defendant to the plaintiff were signed: "The Surety Fund Life Company, By S. A. Morgan, Secretary to the Medical Director." The medical director testifies as to the duties of his secre-

tary, who acted as his stenographer. His testimony is not altogether satisfactory. He was out of town when the letters came from the plaintiff and when the two first letters were written to her. He says that it was not the duty of his secretary or stenographer to open letters or to answer as these were answered. Just how she came to write as she did is not shown. But the fact is that the letters from the plaintiff were addressed to the company and received by it, and the answers were sent in the name of the company. Whether the secretary of the medical director answered on her own initiative does not appear. It does not affirmatively appear that some one other than the medical director, and possessed of authority, directed what should be done. Anyway, the letters were sent in due course in the company's name in response to the letter of the plaintiff. Just who should be included within the term "agent" as used in the condition we need not consider. There is no difficulty in sustaining a finding of the jury that the letters were the company's act and that the waiver was not by an unauthorized agent.

Order affirmed.

TIM A. FRANCIS v. W. A. KNERR.¹

May 20, 1921.

No. 22,230.

Process — plaintiff may sign summons for himself.

1. A plaintiff who is not an attorney of this state may sign a summons in his own behalf, and the fact that his signature to it in behalf of his coplaintiff is invalid, merely results in a defect of parties plaintiff, the objection to which is waived, unless taken by answer or demurrer.

Same — service of summons on defendant.

2. To acquire jurisdiction over a defendant by the service of a summons, the summons must, in substance, comply with the requirements of the statute.

Summons invalid.

3. A summons which requires the defendant to serve his answer on the plaintiff at his office in a designated city in this state, when, in fact,

¹Reported in 182 N. W. 988.

the plaintiff is a nonresident and has no office in such city, does not comply in substance with the requirements of the statute and is a nullity.

Action in the district court for Cass county to recover \$75.34. Judgment by default was entered against defendant. The motion of defendant, appearing specially for that purpose, to vacate the judgment on the ground that the court had not acquired jurisdiction of the defendant, was granted. From the order setting aside the judgment, plaintiff appealed. Affirmed.

Charles S. Marden, for appellant.

Brattland & McLaughlin and *W. A. Kneer*, for respondent.

TAYLOR, C.

This is an appeal from an order setting aside a judgment on the ground that the court had no jurisdiction to render it.

The summons and complaint were served on the defendant personally on August 26, 1918, and judgment was entered against him by default on September 18, 1918. The motion to vacate the judgment was made in August, 1920.

The summons was regular in form. It required the defendant to serve his answer to the complaint on the subscriber "at his office in the City of Moorhead, Clay County, State of Minnesota," and was signed: "Tim A. Francis, attorney for plaintiff." Francis was an attorney of the state of North Dakota, and resided and had his office in the city of Fargo in that state. He was not an attorney of this state and had no office in the city of Moorhead or elsewhere in this state. Not being an attorney of this state he was prohibited from signing the summons as an attorney "except in his own behalf." G. S. 1913, § 4947. But he was a plaintiff and therefore had the right to sign the summons for himself, and we may concede that the prohibition against signing it, except in his own behalf, rendered the signature invalid only as to his coplaintiff, and merely resulted in a defect of parties plaintiff which could be taken advantage of only by answer or demurrer.

The summons, although not process in the technical sense, is the notice by service of which jurisdiction is acquired over the defendant.

The statute provides that: "The summons shall be subscribed by the

plaintiff or his attorney, be directed to the defendant, and require him to serve his answer to the complaint on the subscriber, by copy, at a specified place within the state where there is a post office, within twenty days after the service on him of such summons." G. S. 1913, § 7729.

That this statute has been given an extremely liberal construction to avoid defeating an action on account of technical and formal defects, which could not reasonably have misled or prejudiced the defendant, is illustrated by the following cases: *Hotchkiss v. Cutting*, 14 Minn. 408 (537); *Gould v. Johnston*, 24 Minn. 188; *Millette v. Mehmke*, 26 Minn. 306, 3 N. W. 700; *Lee v. Clark*, 53 Minn. 315, 55 N. W. 127; *Houlton v. Gallow*, 55 Minn. 443, 57 N. W. 141; *W. W. Kimball Co. v. Brown*, 73 Minn. 167, 75 N. W. 1043.

It is recognized, however, that the notice, by the service of which the court requires jurisdiction of the defendant, must, in substance, comply with the requirements of the statute, and must be sufficient to inform the defendant of the essential matters which the statute requires to be stated therein for the purpose of enabling him to answer and defend.

In *Gould v. Johnston*, 24 Minn. 188, it is said: "If the summons contains, in substance, what is required by the statute, however informal it may be, and whatever surplus matter may be in it, the court acquires jurisdiction by service of it."

In *Lee v. Clark*, 53 Minn. 315, 55 N. W. 127, it is said: "When there has been a departure from the requirements of the statute in regard to the service of a summons in any substantial matter affecting the rights of a defendant, jurisdiction of his person will not be acquired, and a judgment entered on such service will be set aside and vacated on proper application."

In *Plano Mfg. Co. v. Kaufert*, 86 Minn. 13, 89 N. W. 1124, it is said: "The statute requires that the summons shall be directed to the defendant, and there must be a substantial compliance therewith. But the direction need not be literally exact, for the statute does not prescribe the form of the summons. It is sufficient in this respect if it clearly informs the defendant that it is intended for him, and requires him to answer the complaint."

In *Lockway v. Modern Woodmen of America*, 116 Minn. 115, 133 N. W. 398, Ann. Cas. 1913A, 555, it is said: "The requisites of a summons as

prescribed by section 4103, R. L. 1905 (§ 7729, G. S. 1913), have never been strictly construed, and no general rule has been laid down as to what defects in a summons are jurisdictional." See also *Flanery v. Kusha*, 143 Minn. 308, 173 N. W. 652, 6 A. L. R. 838; *Savings Bank of St. Paul v. Authier*, 52 Minn. 98, 53 N. W. 812, 18 L.R.A. 498; *Berryhill v. Sepp*, 106 Minn. 458, 119 N. W. 404; *Lawton v. Barker*, 105 Minn. 102, 117 N. W. 249; *Eggleston v. Wattawa*, 117 Iowa, 676, 91 N. W. 1044; 1 Black, Judgments, 333, § 223.

It may be said that the point now in question was not involved or decided in the cases above cited. But the statement that, if the summons is regular on its face and is served in the manner provided by the statute, the court acquires jurisdiction thereby, made in *Hotchkiss v. Cutting*, 14 Minn. 408 (537); *Millette v. Mehmke*, 26 Minn. 306, 3 N. W. 700; *Houlton v. Gallow*, 55 Minn. 443, 57 N. W. 441; and *W. W. Kimball Co. v. Brown*, 73 Minn. 167, 75 N. W. 1043, was also obiter to a certain extent, for the sweeping statement made was not necessary in the decision of those cases and must be interpreted in view of the situation in which it was used. The court can hardly have intended to hold that it would not look beyond the form of the summons in determining the question of jurisdiction where the information conveyed to the defendant therein, and on which he had the right to rely, is conclusively shown to have been both untrue and misleading. The statute requires the summons to designate a place within the state at which the defendant is required to serve his answer upon the one who subscribes the summons. The summons in question was subscribed by Tim A. Francis, and required the answer to be served on him at his office in the city of Moorhead. The defendant had the right to rely on the information given him in the summons, and had the right to take the full time allowed by statute in the preparation of his answer. If on the twentieth day he had attempted to serve his answer as required by the summons, he would have been unable to do so, for the place at which it was required to be served did not exist, and the person upon whom it was required to be served could not have been found within the state. By the time he had ascertained these facts it might have been too late to prevent a default. Of course there are ways in which a defendant can protect his rights in such cases and be relieved from any wrongful judg-

ment entered against him. But the statute requires the summons to state when, where and on whom the answer is to be served, and contemplates that there shall be a place within the state at which it may be served and a person at that place upon whom it may be served, and it cannot be said that a summons which requires the answer to be served on a nonresident at a place which does not exist complies in substance with the statutory requirements. The statutory requirements are for the benefit and protection of the defendant, and we think a plaintiff cannot be permitted to institute an action by the service of a summons as misleading as the one here in question.

We hold the summons void and the order appealed from is affirmed.

STATE v. FRANK PUGLIESE.¹

May 20, 1921.

No. 22,232.

Not misconduct of prosecutor to hand witness transcript of his testimony.

1. On the trial of an indictment the court made an order excluding the state witnesses from the court room until called to testify; prior to the indictment the witnesses had given their testimony before an examining magistrate, which was reduced to writing; subsequent to the order excluding the witnesses from the court room, the prosecuting attorney handed to each of them a transcript of the evidence given before the magistrate, with the suggestion that each read over what he had formerly testified to, for the purpose of refreshing his memory, and each did so; *held* not misconduct on the part of the prosecuting attorney.

Evidence admissible.

2. Evidence of two apparently independent crimes, committed by the same person at about the same time, *held* admissible on the trial of an indictment charging one thereof, as tending to connect defendant with the commission of both as a part and parcel of one transaction.

Verdict sustained by evidence.

3. The evidence supports the verdict, and there were no errors in the admission or exclusion of evidence nor in the charge to the jury.

¹Reported in 182 N. W. 958.

Defendant was indicted by the grand jury of Anoka county charged with the crime of grand larceny in the first degree, tried in the district court for that county before Giddings, J., and a jury, and found guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Brady, Robertson & Bonner, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *Will A. Blanchard*, County Attorney, for respondent.

BROWN, C. J.

The evidence in this case shows that on the early morning of April 25, 1919, some person or persons broke into a garage in the city of Anoka and stole therefrom an automobile belonging to S. H. De Long; at about the same time the same person or persons burglarized the store of Smith Bros. also in Anoka, and took, stole and carried away about 100 suits of men's clothing; it tends to show that the stolen clothing was placed in the back part of the automobile and thus taken away. The automobile was a Ford sedan, practically new, and was subsequently found in Northeast Minneapolis, where it had been abandoned, at a point about a mile from defendant's residence or place of business.

The evidence further shows that at about half past six o'clock in the morning of the day stated, and no doubt not long after the crime had been committed, a Ford sedan automobile, with the back seat filled with what appeared to be clothing, was driven from Anoka to Minneapolis on the "east river road," passing several workmen engaged in repairing the road some 4 or 5 miles out of Anoka. The automobile was of the kind and make of the one stolen from De Long a few hours before. The workmen took notice of its appearance and the contents thereof and of the driver. They subsequently identified defendant as the person driving the same. The stolen clothing was never found.

Defendant was indicted and on trial convicted of stealing the automobile. As a witness on the trial he denied any connection with the transaction and offered evidence of an alibi, and as showing that he was at his home in Minneapolis at the time the crime was committed. The court denied a new trial and defendant appealed.

The points urged in support of the appeal are: (1) Alleged misconduct of the prosecuting attorney in the conduct of the trial; (2) error in the admission of evidence of another separate and independent crime; (3) that there was error in the charge to the jury; and (4) that the evidence is wholly insufficient to justify the verdict. We consider them in their order.

1. It appears that, after defendant had been arrested and formally charged with the commission of the crime, a preliminary examination was had and the testimony of the witnesses produced by the state taken down and subsequently transcribed by the court reporter. The testimony so taken and transcribed included that of the several highway laborers who identified defendant as the person driving the automobile at the time and place heretofore stated. At the trial on the indictment the court made an order excluding all those witnesses from the court room until called to the stand. The county attorney conducting the prosecution had in his possession a copy of the transcript of the evidence taken on the preliminary hearing, and, after the order excluding the witnesses from the court room, he gave it to each of them to read, to the end that they might refresh their memory on the subject. This is assigned as prejudicial misconduct on the part of the county attorney, for which a new trial should be granted. The contention is not sustained.

There was no discussion between the county attorney and the witnesses, nor between the witnesses, as to what either had formerly testified to, nor discussion of the testimony given by any witness who previously had been called on this trial as to what fact or facts he testified to; all the record shows is that the county attorney furnished the transcript and asked each witness to read over the testimony he formerly gave in the matter. Clearly there was no misconduct in this. It is a matter of common practice, in both civil and criminal cases, where a witness in the cause has testified on a former trial, to read over the testimony then given to refresh his mind on the matters testified to at that time. We are unable to find sound reason for serious criticism of the practice generally, or as applied to the case at bar.

2. The contention that it was error to admit evidence of the theft of the clothing, because a separate and independent crime, is not sound.

The evidence makes it quite clear that both crimes were committed by the same person or persons, and constituted substantially one transaction. The goods had been stolen and it was necessary to get them from the scene of action with all convenient haste; they were too bulky to be carried by hand, the automobile route was the only available method, and the automobile in question was taken and appropriated for the purpose. The evidence comes within the rule applicable to such cases, and as tending to connect the same person with the commission of both crimes as part and parcel of one transaction. *State v. Monroe*, 142 Minn. 394, 172 N. W. 313; *State v. Lyons*, 144 Minn. 348, 175 N. W. 689; *State v. Fitchette*, 88 Minn. 145, 92 N. W. 527; 8 R. C. L. 197.

3. We find no error in the instructions of the trial court. * Taken as a whole the charge was a clear and concise statement of the rules of law applicable to the case and free from error. The respects in which defendant insists there was error are not substantial and do not require specific mention or discussion. It is sufficient to say that we have carefully considered the subject with the result stated.

4. The contention that the evidence is insufficient to justify the verdict presents one of the principal questions in the case. It is not sustained. The commission of the crime by some one is conclusively established by the evidence; it is not contended to the contrary. The basis of the claim that the evidence is not sufficient to connect defendant with it as the guilty party is that the testimony identifying him as the driver of the automobile, as heretofore recited, is too unreliable and doubtful of probative force to meet the requirements of the law that guilt be established beyond a reasonable doubt. But we think the evidence brings the case within the rule, at least the question was one of fact for the jury. The witnesses, on whose testimony defendant was connected with the crime, were laborers on the highway taken by the thief on his escape from Anoka. They noticed the kind and character of the automobile, that the back seat thereof was filled with packages of some sort, and looked particularly at the driver. They all testified, apparently without hesitation, that defendant was such driver; they did not waiver in their identification. They picked him out at the jail soon after the crime had been committed, and reiterated their identification again at the trial. If their testimony is worthy of belief, a question

for the trial court and jury, the verdict is fully supported. The weight to be given their testimony was also for the jury, and we cannot well say, from the printed record and without the advantages of observation afforded below, that it should be rejected as of no value. And we are content, supported by the approval of the verdict by the learned trial judge, to sustain the conviction as sufficiently supported by competent evidence. A discussion thereof would serve no useful purpose. The showing of an alibi by defendant is quite strong on its face, but the verity of the witnesses, the chance of error as to dates and in other respects, were for the jury, and their conclusion thereon cannot be disturbed.

This covers the case and all that need be said in disposing of the points involved. The evidence supports the verdict, and the record presents no error. The order denying a new trial is therefore affirmed.

EMILIE S. RICKER v. J. L. OWENS COMPANY AND
ANOTHER.¹

May 20, 1921.

No. 22,244.

Sale of stock — rescission of contract — laches.

1. In an action to rescind a contract for the sale of stock in a corporation, where it appears that plaintiff continued her efforts to surrender the stock and recover the money paid therefor for a period of three years, though not in form amounting to a legal demand, *held*, that the testimony does not support a finding that plaintiff was guilty of laches.

Laches an equitable defense.

2. The rule applicable to the defense of laches does not depend entirely upon the lapse of time. It is an equitable defense based upon grounds of public policy. A party may be barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of the right.

¹Reported in 182 N. W. 960.

Action in the district court for Hennepin county to cancel a certain sale of stock and to recover \$5,060. The case was tried before Bardwell, J., who made findings of fact as narrated in the opinion, and ordered judgment in favor of defendants. From an order denying her motion for amended findings and conclusions or for a new trial, plaintiff appealed. Reversed.

O'Malley & O'Malley, for appellant.

Selover, Schultz & Mansfield, for respondents.

QUINN, J.

The J. L. Owens Company is a corporation organized under the laws of the state of Minnesota, engaged in manufacturing fanning mills and other like machinery. The J. L. Owens Manufacturing Company was organized under the laws of the state of Maine as a holding concern. It owns principally all of the stock of the former company and is engaged largely in handling its output of machinery. It does no manufacturing. Both companies have their principal place of business at Minneapolis, and their offices are filled largely by the same individuals. D. W. Parsons was the attorney for the former company and treasurer of the latter. In March, 1910, plaintiff had a conversation with J. L. Owens about the purchase of some stock in the Owens Company. He referred her to Parsons, who sold her fifty shares of stock of the par value of \$100 each, in the manufacturing company, for which she paid \$5,000 and \$60 for reputed dividends thereon. Plaintiff is the mother of Clyde S. Ricker, who was 22 years of age at the time of the transaction, and in the employ of the Owens Company. He was inexperienced in business matters but remained with the company until May, 1913.

The trial court found as matters of fact, that plaintiff was informed by defendants' representatives in March, 1910, that it would be necessary for her son to furnish a surety bond, but if she would buy 50 shares of stock in the company such a bond would be waived. That plaintiff agreed to take the stock, the certificates therefor were issued and the stock paid for as stated. That plaintiff had never heard of the manufacturing company at the time of the purchase of the stock and did not know that there were two separate companies, but was led to believe by the representatives of defendants that the stock offered to her and which

she purchased was stock in the J. L. Owens Company. That she first heard of the manufacturing company when the certificates of stock were delivered to her, and she was then led to believe that the two companies were one and the same. That, at the time she agreed to purchase such stock, the officers and agents of defendants made certain representations as to the value of such stock, the dividends which it had earned, the assets of the company and its future prospects, all of which were false and untrue, and that in purchasing such stock plaintiff believed and relied thereon.

The trial court also found that plaintiff's son remained in the employ of defendants until May, 1913, during which time he became somewhat familiar with the methods and relations of the two companies and that he communicated the same to the plaintiff on and prior to November 1, 1910. That plaintiff learned and became aware of the falsity of the statements and representations respecting the value of the stock, the dividends earned and the assets of the company prior to January, 1912, but that notwithstanding such knowledge she made no attempt to rescind the contract for the purchase of such stock, but thereafter continued to exercise ownership over the same, demanded dividends thereon and thereby waived her right to rescind and accordingly was guilty of laches and that defendants were entitled to judgment.

We are unable to agree with the final conclusion reached by the learned trial court to the effect that plaintiff was guilty of laches so as to entitle defendants to judgment. The court found, and there was ample testimony in the record to warrant the finding, that plaintiff was deceived and misled in the purchase of the stock. There is proof throughout the record tending to show that the plaintiff supposed she was dealing with and negotiating for stock in the J. L. Owens Company; that she knew nothing of the manufacturing company until the time of receiving the certificates when she was lulled into the belief that the two companies were one and the same entity. Her son was in the employ of defendants, was authorized to act for plaintiff, and it appears from the testimony that he made several informal applications to the representatives of defendants for the return of the money which plaintiff had paid for the stock and the surrender of the certificates to the defendants. None of such attempts brought the desired result. Dif-

ferent reasons were given as to why matters could not be adjusted at the time, and so little progress was made toward a settlement. Similar efforts were put forth on behalf of the plaintiff at divers times between August, 1910, and the time of the commencement of this action.

It is well settled in this state that a party is held barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of the right. *Sweet v. Lowry*, 131 Minn. 109, 154 N. W. 793. No such circumstances in the record of the instant case appear. It is apparent that during the entire period it was the desire of the plaintiff to procure a return of the money which she had parted with. There was no evidence that she intended to abandon the effort. The rule applicable is fully and clearly stated in the case of *Brockman v. Brockman*, 133 Minn. 148, 152, 157 N. W. 1086, 1088, where it was said: "The defense of laches does not, like the statute of limitations, depend entirely upon lapse of time. That is only one of the considerations involved. It is an equitable defense based upon grounds of public policy, which require, for the peace of society, the discouragement of stale demands." Applying these principles, we are of the opinion that the testimony as shown by the record does not justify the conclusion that there was any intention on the part of the plaintiff to abandon her efforts to obtain a return of her money and the surrender to defendant of the certificates of stock issued to her. While the efforts put forth by the son may not have been in accordance with the rules and requirements of law to make out a legal demand upon the defendants, yet it is clear that there was no purpose on the part of the plaintiff to abandon efforts to that end. We think the final conclusion of the trial court was wrong in that respect and that a new trial should be granted.

Order reversed.

On June 17, 1921, the following order was filed:

The order remanding this cause will be and is amended to read as follows:

It is therefore ordered, that the order appealed from be reversed with directions to the court below to render judgment for plaintiff for the amount claimed in the complaint, subject to the right of defendant to move the court below for a new trial of the issue of laches.

STATE v. E. F. CHRISTOFFERSON¹.

May 20, 1921.

No. 22,263.

Indictment sufficient to warrant conviction for assault in third degree.

A defendant may be convicted of an assault in the third degree under an indictment charging him with an attempt to commit rape by forcibly overcoming the resistance of the female, as the commission of an assault is necessarily included in the offense charged.

Defendant was indicted by the grand jury of St. Louis county charged with the crime of an attempt to commit rape. Defendant's demurrer to the indictment was overruled. On the trial before Watts, J., and a jury he was convicted of assault in the third degree. His motion for acquittal and absolute discharge was denied. From the judgment entered pursuant to the verdict, defendant appealed, Affirmed.

John Jenswold and *John D. Jenswold*, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, *Warren E. Greene*, County Attorney, and *Spencer Searls*, Assistant County Attorney, for respondent.

TAYLOR, C.

The defendant was indicted for the crime of an attempt to commit rape. The court instructed the jury that they could find him guilty of the offense charged, or guilty of an assault in the third degree, or not guilty. They found him guilty of an assault in the third degree. From the judgment entered on this verdict he appeals.

The settled case contains only the defendant's requests to charge and the charge of the court with the exceptions thereto. It contains none of the evidence.

The defendant made a motion for the entry of a judgment of acquittal, on the ground that the verdict of guilty of an assault in the

¹Reported in 182 N. W. 961.

third degree amounted to an acquittal of the crime charged, and that he could not be convicted of an assault in the third degree under an indictment charging an attempt to commit rape. He stated in the motion that it was made "without in any manner waiving his constitutional right to not be again placed in jeopardy for the offense charged in and by the indictment herein nor in any manner moving for or consenting to the granting of a new trial herein upon this indictment." Consequently the only question before the court is whether the defendant could be convicted of a simple assault under the indictment.

The statute provides that "the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment." G. S. 1913, § 9213.

The defendant insists that the crime of an attempt to commit rape may be committed without committing an assault and therefore does not necessarily include the commission of that offense, and that he cannot be convicted of an assault under an indictment charging an attempt to commit rape for that reason. The statute declares that: "An act done with intent to commit a crime, and tending, but failing, to accomplish it, is an attempt to commit that crime." G. S. 1913, § 8490.

The statute, in five subdivisions, defines five distinct ways in which the crime of rape may be committed. G. S. 1913, § 8655. An indictment under this statute must allege the acts constituting the crime so as to inform the accused in which one of these different ways he is charged with having committed it. And where the indictment charges the commission of acts which constitute the crime as defined in one subdivision of the statute, he cannot be convicted under that indictment by proving the commission of different acts which would constitute the crime as defined in a different subdivision. *State v. Vorey*, 41 Minn. 134, 43 N. W. 324; *State v. Hann*, 73 Minn. 140, 76 N. W. 33; *State v. Farrington*, 59 Minn. 147, 60 N. W. 1088, 28 L.R.A. 395; *State v. Henn*, 39 Minn. 464, 40 N. W. 564.

The way of committing the crime defined in the second subdivision of the statute is by forcibly overcoming the resistance of the female. The indictment in question charges an attempt to commit the crime in the manner defined in this subdivision. It charges that E. F. Christofferson "did wrongfully, unlawfully, wilfully and feloniously at-

tempt to have sexual intercourse with one Ruth Rust against her will and without her consent. * * * the said E. F. Christofferson then and there attempting to overcome the resistance of the said Ruth Rust to the said sexual intercourse forcibly and then and there striking, beating and choking the said Ruth Rust, all of which said acts were then and there done by the said E. F. Christofferson with intent to commit the crime of rape, and which acts then and there tended but failed to accomplish said crime."

The offense charged could be proven only by proving an attempt to overcome the resistance of the female by the use of force and necessarily involved proving an assault.

Whether it may be possible to commit the crime of an attempt to commit rape in some of the ways defined in the other subdivisions of the statute without committing an assault, it is not necessary to determine, for the offense here charged necessarily includes an assault, and the defendant could not be convicted under this indictment without proving an assault.

In *State v. Macbeth*, 133 Minn. 425, 158 N. W. 793, the offense charged was an attempt to commit rape and the indictment was drawn under the same subdivision of the statute under which the present indictment is drawn. The court said, in effect, that the offense charged included both an intent to commit the crime of rape and an assault, and remarked that the question as to whether the defendant had committed an assault in the third degree ought to have been submitted to the jury. Defendant seeks to distinguish that case from this on the ground that the indictment in that case expressly charged an assault. While the present indictment does not use the term assault, it charges the beating and choking of the female as the overt acts by which the defendant attempted to overcome her resistance and accomplish the crime. These acts constituted an assault, and charging that defendant committed them charged him with committing an assault as effectively as if that term had been used.

The form of the indictment is criticised. Perhaps it might be improved, but we think it is sufficient to charge an attempt to commit the

crime of rape as defined in subdivision 2 of section 8655 of the general statutes.

The judgment is affirmed.

J. H. WOOD v. HARRY NEWELL.¹

May 20, 1921.

No. 22,266.

Contract with incompetent valid, when — case followed.

1. A contract with a person of unsound mind will not be set aside or annulled at his suit after restoration to normal condition where it appears that it was entered into in good faith and without fraud, for a fair consideration and without notice of the disability to the other contracting party, and no inequitable advantage has been derived therefrom. *Schaps v. Lehner*, 54 Minn. 208, followed and applied.

Rule applied to executory contract for sale of land.

2. The vendee in an executory contract for the sale of land, though he has not the fee title, may invoke the rule and thus prevent the annulment of the contract.

Decision for defendant sustained by evidence.

3. The evidence supports the findings of the trial court, the record presents no reversible error either in the admission or exclusion of evidence, and the findings of fact support the conclusions of law.

Action in the district court for Jackson county to cancel an executory contract for the sale of land. The answer alleged that about a week after defendant had purchased the land he resold it to one P. S. Silly and that he was no longer the owner thereof. The case was tried before Dean, J., and a jury which answered in the negative the question: "Did the plaintiff, at the time of the signing of the contract in question, possess sufficient strength of mind and reason to understand the nature and consequences of his act in executing it?" The court made findings and ordered judgment in favor of defendant. Plaintiff's motion for amended findings and conclusions was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

¹Reported in 182 N. W. 965.

Wilson Borst and Ole Thorson, for appellant.
E. H. Nicholas, for respondent.

BROWN, C. J.

Action to cancel and annul an executory contract for the sale of land in which defendant had judgment and plaintiff appealed.

It appears that plaintiff is the owner of the land in question and has been such owner for some time. On October 10, 1918, by formal writing he authorized Strom & Strom, real estate dealers residing in Jackson, Jackson county, the county wherein the land is situated, to sell the same at the price of \$140 per acre, the authority thus granted to continue until revoked by plaintiff on 30 days' notice. Of this authority and the terms thereof there is no dispute on the record. Thereafter on May 5, 1919, H. L. Strom, a member of the firm of Strom & Strom, effected a sale of the land to defendant herein at the price two dollars per acre over the limit fixed by plaintiff. An executory contract, which this suit seeks to set aside, was drawn up, specifying the terms of sale, and submitted to plaintiff for approval. He approved it and formally signed and executed the same and authorized the delivery thereof to defendant, the purchaser, at the same time directing Strom, his agent, to deposit the down payment of \$1,000 which the contract called for to the account of plaintiff in the First National Bank of Jackson. The agent delivered the contract to defendant and deposited the down payment, less his commission of \$320, as directed by plaintiff, and the deposit was duly credited to plaintiff's check account in that bank. About a week later, as found by the trial court, defendant, acting through another person as his agent, entered into a contract for the sale of the land to one Cilley of the state of Iowa at an advance in the purchase price, which netted defendant a profit over and above a commission paid his said agent.

In August, 1919, plaintiff brought this action to annul the contract on the ground, as alleged in the complaint, that, at the time it was entered into, by reason of an illness of which he was then suffering plaintiff was mentally incompetent to enter into the same. Defendant put in issue the alleged incompetence of plaintiff and affirmatively alleged that, in entering into the contract, he acted understandingly and upon

the advice of his attorney and of the agent Strom; that defendant was not personally present, knew nothing of the alleged incompetent state of plaintiff's mind, and relied in good faith upon the representations and the authority of the agent Strom. Defendant alleged further that the land was at the time of no greater value on the market than the agreed purchase price of \$140 per acre. All allegations of new matter were put in issue by a reply.

At the trial one specific issue was submitted to a jury, namely, the question whether, at the time the contract was entered into, plaintiff was laboring under mental disability, and the jury found in his favor thereon, and to the effect that he was mentally incompetent to enter into the transaction. All other issues and questions were tried to the court, and after the return of the special verdict the court made findings covering the whole case, and thereon found as conclusions of law that plaintiff was not entitled to the relief demanded.

The court found, among other things, that the contract price of the land, namely, \$142 per acre, was above the real market value thereof at the time, and that the contract was a fair one for plaintiff; that it was entered into under the advice of plaintiff's counsel, as well as on the advice of the agent Strom; that plaintiff personally directed certain terms of the contract, and, at the time he signed it, appeared to his attorney and to Strom as mentally sound and capable of understanding the transaction fully; that the attorney and agent acted in good faith, and, although plaintiff was then in a hospital under the care of physicians, discovered no reason to believe that he was mentally in distress. The court further found that defendant also acted throughout in good faith and had no knowledge of the alleged incompetence of plaintiff; the down payment, less the agent's commission was deposited to the credit of plaintiff, as he directed, and the evidence tends to show that plaintiff checked out at least a part thereof in the course of his ordinary business affairs; no part of the money has been returned, nor offered to be returned.

The court also found that at no time prior to August, 1919, when this action was commenced, or after he had recovered from his illness, shortly after the contract was entered into, did plaintiff in any way repudiate the transaction or express dissatisfaction therewith, and remained wholly

silent upon the subject until the selling price of land in the neighborhood had suddenly increased beyond the price for which this land was sold.

Plaintiff contends in support of the appeal that the verdict of the jury declaring him incompetent at the time the contract was entered into disposes of the merits of the case in his favor and entitles him to a judgment annulling the contract; that the findings of the trial court to the effect that no unfair advantage was taken of plaintiff, that the sale of the land was at a fair price, and that defendant was without knowledge of any mental infirmity on the part of plaintiff and acted in entire good faith, are not supported by the evidence, and, in any event, since defendant has only an equitable interest in the land, insufficient as a basis for the denial of the relief demanded by the action.

We are unable to concur in these contentions. The fact of mental incompetence, standing alone, no doubt is sufficient to support a judicial annulment of a contract. But that fact, though established by the special verdict of the jury, is overcome and this case brought within the rule stated and applied in *Schaps v. Lehner*, 54 Minn. 208, 55 N. W. 911, by the special facts found by the trial court. It was there held, and the decision is supported by the authorities generally, that a contract with a person of unsound mind will not be set aside or annulled at his suit after recovery from his disability, where it appears that it was entered into in good faith, for a fair consideration and without notice to the other party of facts or circumstances sufficient to put a prudent person upon inquiry as to such mental incapacity, and no inequitable advantage has been derived therefrom. *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; 3 Notes on Minn. Reports 1002, and citations.

The findings of the court bring the case within the rule, and show, further, a ratification of the transaction by plaintiff after recovery from his illness in failing promptly to rescind by returning the consideration paid him or offering to do so. The contract unquestionably was a fair one, the sale of the land was at a price of two dollars per acre above that stipulated in the Strom agency contract; there was no fraud, and no inequitable advantage was taken of plaintiff, or secured to defendant. Plaintiff was not insane, nor been so adjudged; the incapacity under which he was laboring was from a severe illness, from which the evi-

dence shows he was rapidly recovering at the time. On these facts the court was fully justified in refusing to annul the contract. 2 Dunnell, Minn. Dig. § 4522. The fact that defendant has only an equitable title to the land does not change the rule stated and here applied. It was so held in Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333, 8 Am. St. 661.

This covers the case and all that need be said in disposing of the various assignments of error. The evidence supports the findings of the trial court and the findings support the conclusions of law.

Judgment affirmed.

STATE v. EARL SCHOMAKER.¹

May 20, 1921.

No. 22,272.

Verdict sustained by evidence.

1. The evidence sustains the jury's finding that the defendant was guilty of rape.

Impeachment of witness — testimony at preliminary examination admissible.

2. It was proper for the state to make use of portions of the testimony of the prosecutrix taken at the preliminary hearing to explain and supplement portions thereof as to which she was interrogated by way of impeachment upon cross-examination. It was not proper to introduce all of her testimony at the preliminary hearing, but in view of the nature of such testimony, and the issue presented, and the general conduct of the trial, there was no prejudice.

State's argument disapproved.

3. The argument of the state in the brief and at bar, referring to matters unfavorable to the defendant, said to have occurred in connection with the case after verdict, and not proper for consideration on the matters presented by the appeal, is disapproved.

Defendant was indicted by the grand jury of Wabasha county charged with the crime of rape, tried in the district court for that county before

¹Reported in 182 N. W. 957.

Callaghan, J., and a jury and found guilty as charged in the indictment. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Murdoch & Lothrop, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *John R. Foley*, County Attorney, for respondent.

DIBELL, J.

The defendant was convicted of rape and appeals from the order denying his motion for a new trial.

1. On the evening of May 12, 1920, the defendant and the prosecutrix went on an auto drive. The prosecutrix claims that he took her out of the auto, on a main traveled road, that she struggled for an hour, and that he accomplished the crime. She was driven home about midnight. She claims that the next morning she complained to her mother. They went together to the doctor. The doctor found evidences of recent intercourse. There was some swelling and sensitiveness. No bruises were noticed. The mother does not corroborate the claim of a complaint made by her daughter. The defendant denies improper conduct of any kind.

The jury could easily find, as was the opinion of the doctor, that intercourse had recently taken place. Whether there was the essential lack of consent and accompanying resistance presents a question of greater doubt. The law upon this matter has been stated and need not be discussed here. *State v. Iago*, 66 Minn. 231, 68 N. W. 969; *State v. Connelly*, 57 Minn. 482, 59 N. W. 479. The defendant weighed some 170 or 180 pounds and was strong. The prosecutrix weighed about 110 pounds and there was evidence that she was not strong. She claims that she was frightened and overpowered and exhausted. The trial court gave careful consideration to the evidence on the motion for a new trial, and while noting the absence of marks of violence and of evidences of a struggle expressed his positive opinion that there was no consent to intercourse, and was content that the verdict stand. We appreciate, as did the trial court, the weakness, in some respects, of the evidence, but we find no sufficient reason to disturb the verdict of the

jury which has the approval of the trial court after mature consideration on the motion for a new trial.

2. There was a preliminary hearing before a justice of the peace. The substance of the testimony of the prosecutrix was taken and afterwards put in typewriting and signed by her. Counsel for the defendant called her attention to discrepancies between her testimony at the trial and the typewritten transcript and cross-examined her upon it. The cross-examination was of some length, but not at all unduly extended. The state then offered in evidence the statement which takes up five pages of the paper book. It was received over objection and error is now predicated upon its reception.

The state was entitled to refer to the portions of the transcript explaining or supplementing the testimony of the prosecutrix to which attention was directed on cross. *Bunkers v. Peters*, 122 Minn. 130, 141 N. W. 1118. We think the whole of the transcript should not have been received. But we cannot think that prejudice resulted. The discrepancies in the testimony of the prosecutrix were not many, and were clearly brought out upon cross-examination by counsel for the defendant. Some portions of her testimony were proper to be received to explain or supplement her cross. The other portions were in repetition rather than addition to her testimony at the trial. While it was objectionable that the jury have this transcript with it in its deliberations, we cannot think that prejudice resulted. The testimony of the prosecutrix on the material points was brief and direct and was explicitly denied by the defendant. There is little likelihood of a confusion of the issue by the reception in evidence of the transcript. The appellant's case was well presented by his counsel and he was dealt with fairly by the court.

3. In the brief of the state the statement is made that one ground of the defendant's original motion for a new trial, not finally presented nor here for review, was newly discovered evidence; that two witnesses made affidavits tending to show that the prosecutrix had been intimate with others; that these affidavits were subsequently found to be untrue; and that these witnesses had been punished for their false oaths. The situation stated was emphasized and enlarged on the oral argument.

The questions before us on this appeal are those discussed in para-

graphs 1 and 2. The statements made in the brief and argument could not rightly affect the trial court in reviewing the sufficiency of the evidence, nor can they aid us in impartially reviewing the decision of the trial court. Unless they were thought likely to affect our review, unfavorably to the defendant, the state could have omitted them safely. If they were thought likely thus to affect our review the state should have omitted them. Their use is disapproved.

Order affirmed.

IN THE MATTER OF THE APPEAL AND CONTEST OF THE
ELECTION OF CHRIST JOHNSON AS COUNTY COMMIS-
SIONER, JACKSON COUNTY v. ADAM BAUCHLE.¹

May 20, 1921.

No. 22,300.

Election — name on official ballot — estoppel.

When a candidate or an elector neglects to take steps, under section 398, G. S. 1913, to have the name of a person not entitled to appear on the official ballot stricken therefrom, he cannot after the election is held raise a valid objection to counting the votes properly marked for such person, there being no claim that the latter had violated any provision of the election laws.

Adam Bauchle and others gave notice of appeal and contest against Christ Johnson from the canvass of votes at the election for county commissioner in the Fourth commissioner district of Jackson county in November, 1920, by which Christ Johnson was declared duly elected commissioner. The matter was heard before Dean, J., who made findings and ordered judgment in favor of Adam Bauchle. From the judgment entered pursuant to the order for judgment, Christ Johnson, contestee, appealed. Reversed.

Wilson Borst and *F. B. Kalash*, for appellant.

Haycraft & McCune, for respondent.

¹Reported in 182 N. W. 987.

HOLT, J.

No one filed as a candidate at the primary election for the office of county commissioner in the Fourth district of Jackson county except Adam Bauchle. Hence he was the sole nominee for that office at the general November, 1920, election, and the name of no other candidate could lawfully be placed upon the official ballot by petition, for the office is nonpartisan, and there was no vacancy to fill. Nevertheless, on September 9, 1920, a petition for the nomination of Christ Johnson was filed with the auditor, who printed the names of both Bauchle and Johnson on the official ballots furnished the voters at the election precincts of the district. On these ballots Adam Bauchle's name was followed by the words: "Nominated without party designation;" and Christ Johnson's by the words: "Nominated by petition." The canvass showed that 249 votes were cast for Bauchle and 693 votes for Johnson. The certificate of election was issued to the latter. Bauchle and two voters in the district instituted a contest. The court held that, since Johnson's name was not entitled to be printed upon the official ballots, the votes cast for him were void and could not be canvassed. The correctness of this conclusion is the only proposition in the appeal.

The printing of Johnson's name on the official ballots was prohibited. G. S. 1913, §§ 333, 371. But it does not necessarily follow that the votes cast for him should be rejected. Had those who marked a cross after his name on the ballot, written his name in the blank space provided for the purpose of permitting a voter to select his own candidate, if not satisfied with any one of those printed on the ballot, no question could have been raised as to his election. The only basis for the contest was that Johnson's name was unlawfully upon the official ballots. No claim was made that he had filed the petition, or that his name came upon the official ballot by his procurement, misconduct or fraud. The court below in his memorandum states: "There is no question raised but what the county auditor acted in good faith, thinking that he had a right to place the name of the contestee on the ballot when a petition was presented for that purpose." The most that can be said is that the official charged with the duty of printing and distributing the ballots innocently misconstrued the law. The law recognizing that officials may err or make mistakes has provided safeguards and means to correct

such errors or mistakes before the ballots are given to the voters. Sample ballots must be published, and errors may be rectified summarily by the courts. Sections 316, 398. It is true that the sample ballots should be published at least two weeks before the election, and in this case the publication in the official newspaper of the county was not made until October 21, and in another newspaper on the twenty-eighth of October, but there was ample time after the first publication for a correction.

This court has already indicated, what seems to be the rule elsewhere, that whether or not a person is to appear on the official ballot as a candidate for election, should be settled before the ballot is handed to the voter at the poll, for even if the name of a candidate has been printed without right, or unlawfully, upon the official ballots, still, when such ballots have been distributed to the voters and voted, the votes cast for such candidate must be counted for him, unless there is some express provision of the statute forbidding. In *Johnson v. Dosland*, 103 Minn. 147, 114 N. W. 465, it was said: "Contests for nomination as party candidates for public office must be settled before the general election, and, when not, those whose names go upon the official ballots as the regular nominees are entitled to all benefits therefrom, whether they, perchance, could have been in contest proceedings ousted of the right or not."

The voters are not bound at their peril to ascertain who filed properly for nomination at the primary, or who were successful there, or if, since then, a vacancy occurred which could be filled by a nomination by petition in the case of a nonpartisan office. It is more reasonable to say that, when at the polls the voter is handed an official ballot, he may rightfully assume that the name of every candidate for office appearing thereon is lawfully there, and that those charged with the duty of furnishing a proper ballot have not subjected themselves to the severe penalty which the law imposes for a violation of that duty.

As said in *Blackmere v. Hildreth*, 181 Mass. 29, 63 N. E. 14: "Under our system of elections the voter receives at the polls from the election officers an official ballot, of which he does not know and is not expected to know anything except what appears upon its face; and as a rule it is impossible, as in this case, by an inspection of the ballot to ascertain whether or not there has been an irregularity in the preparation

of it. He takes this ballot, sees upon it the names of the candidates, and, having expressed thereon in due form his choice, deposits it in the ballot box." The court held the vote should be counted though cast for one who was not lawfully entitled to be on the ballot, citing with approval from *People v. Wood*, 138 N. Y. 142, 42 N. E. 536, where Chief Justice Andrews, in a decision of the same tenor, says:

"The effort in this proceeding is to disfranchise innocent voters because of a latent defect in the official ballot furnished by the state, not discernable on inspection, which ballot they were compelled to use, the defect consisting in the unauthorized insertion therein by a public official, charged with the duty of making up and printing the ballots, of names of candidates in a party column not duly nominated by such party. The intention of the voters who used this party column to express their choice is clear and admits of no doubt. Each one received his ballot from the inspectors, marked it with the cross under the party name and emblem and returned it to the inspectors, by whom it was deposited in the box and subsequently counted. We can conceive of no principle which permits the disfranchisement of innocent voters for the mistake or even the wilful misconduct of election officers in performing the duty cast upon them. The object of election is to ascertain the popular will, and not to thwart it. The object of election laws is to secure the rights of duly qualified electors, and not to defeat them. Statutory regulations are enacted to secure freedom of choice and to prevent fraud, and not by technical obstructions to make the right of voting insecure and difficult."

To the same effect are: *Baker v. Scott*, 4 Idaho, 596; *State v. Bernholtz*, 106 Iowa, 157; *Peabody v. Burch*, 75 Kan. 543; *State v. Farnsham*, 19 Mont. 273; *Bragdon v. Navarre*, 102 Mich. 259; *Miller v. Pennoyer*, 23 Ore. 364; *State v. Bunnell*, 131 Wis. 198. Our statute provides: "All ballots shall be counted for the persons for whom they were intended, so far as such intent can be clearly ascertained from the ballots themselves, and, in determining such intent, the following rules shall be observed." Nine rules are given, none of which excluded the counting of the 693 votes given for Johnson. Rule 9 reads: "All ballots marked as hereinbefore provided shall be counted for the candidates or measures therein shown to be voted for."

Respondent Bauchle relies on the case of *King v. McMahan*, 179 Ky. 536, 200 S. W. 956, which holds that, when the name of a candidate is on the ballot without authority, his votes cannot be counted. We think the contrary view, supported by the authorities hereinbefore cited, should obtain.

The judgment is reversed.

IN THE MATTER OF THE ESTATE OF THOMAS BOUTIN,
DECEASED.¹

May 20, 1921.

No. 22,329.

Inheritance tax — practical construction of officials.

The practical interpretation, given the inheritance tax law by the state officials concerned in its enforcement during a long period of time, should be given weight by this court when the question of the proper construction of such law is presented. In view of the rule stated, it is *held* that upon all property, passing to the heir or legatee, in excess of the clear value of \$15,000, the secondary rate applies, the primary rate applying only to what remains of the first \$15,000 after deducting the exemption.

Upon the relation of Clifford L. Hilton, Attorney General, the supreme court granted its writ of certiorari directed to the probate court of Swift county, Edwards, J., to review the action of that court in the matter of inheritance taxes due the state from the estate of Thomas Boutin, deceased. Reversed and remanded.

Clifford L. Hilton, Attorney General, and *Egbert S. Oakley*, Assistant Attorney General, for relator.

Charles L. Kane, for respondent.

HOLT, J.

Certiorari to review the action of the probate court fixing the transfer

¹Reported in 182 N. W. 990.

tax to be paid by a widow, who under her husband's will took his entire estate, amounting to \$20,566.88 after deducting all claims, allowances, and expenses of administration. The court determined that since the clear value of the widow's interest, after deducting her exemption of \$10,000, did not exceed \$15,000, no other rate than the primary rate of one per cent was payable upon any part of her distributive share. The state contends that, for the purpose of fixing the rate, the exemption is not to be considered. Hence when the clear value of the estate to be distributed to the widow is \$15,000, or more, no other sum than \$5,000 may take the primary rate, and, upon whatever amount in excess of \$15,000 the widow receives, the secondary or two per cent rate must be paid. In this case it would be one per cent on \$5,000, and two per cent on \$5,566.88.

State v. Probate Court of Hennepin County, 111 Minn. 297, 126 N. W. 1070, is said to sustain the court below. But significant changes in the law went into effect after that decision was rendered. Then chapter 288, p. 427, Laws 1905, was in force, and it clearly indicated that only that part of an inheritance or legacy which was in excess of \$10,000 could be considered in computing the tax or fixing the rate. In the subsequent enactment, chapter 372, p. 516, Laws 1911 (G. S. 1913, § 2272), the whole inheritance or legacy is subject to a transfer tax, but a certain amount thereof is exempt to the heir or legatee according to the relationship he or she sustained to the decedent.

Section 2 provides: "The tax so imposed shall be computed upon the true and full value in money of such property at the rates hereinafter prescribed and only upon the excess of the exemptions hereinafter granted. * * *

Section 2a. When the property or any beneficial interest therein passes by any such transfer where the amount of the property shall exceed in value the exemption hereinafter specified and shall not exceed in value fifteen thousand dollars the tax hereby imposed shall be: (1) Where the person entitled to any beneficial interest * * * shall be the wife, or lineal issue, at the rate of one per centum of the clear value of such interest in such property. * * *

Section 2b. The foregoing rates in section 2a are for convenience termed the primary rates. When the amount of the clear value of such

property or interest exceed fifteen thousand dollars, the rates of tax upon such excess shall be as follows: (1) Upon all in excess of fifteen thousand and up to thirty thousand dollars one and one-half times the primary rates * * *

Section 2c. The following exemptions from the tax are hereby allowed:

(2) Property of the clear value of ten thousand dollars transferred to the widow of the decedent. * * *

The court below found "that at all times since April 20, 1911, the judges of the Minnesota Probate Courts and the Assistant Attorneys General in charge of Inheritance Tax Matters in Minnesota have by a well established practice universally and in more than ten thousand cases construed chapter 372 of the Laws of 1911 in the manner contended for by the petitioner" (the state) herein.

This practical construction, adopted by the officers whose duty it is to administer the law for such a long period, moves the members of the court, who would otherwise be inclined to follow the decisions of Illinois and New York (In re Ullmann Estate, 263 Ill. 528, 105 N. E. 292, 51 L.R.A.(N.S.) 1075, Ann. Cas. 1915C, 321; Matter of Schwarz' Estate, 156 App. Div. 931, 141 N. Y. Supp. 349, affirming upon dissenting opinion of Jenks, P. J. in Matter of Jourdan, 151 App. Div. 8, 135 N. Y. Supp. 172, sustained in 209 N. Y. 537, 102 N. E. 1113), to apply the interpretation given very similar statutes in Estate of Timken, 158 Cal. 51, 109 Pac. 608; Torrance v. Edwards, 89 N. J. Law, 507, 99 Atl. 136; and In re Hone's Estate, 50 Utah, 92, 166 Pac. 990. According to the last mentioned cases only the unexempt part of the first \$15,000 worth of clear property which passes to the heir or legatee from the decedent takes the primary rate, and all the property in excess of \$15,000 in value, without regard to any exemption whatever, must pay the secondary rate. The words "clear property" plainly cannot refer to the property left after the exemption is deducted, for, in designating the exemption itself, the same words are used. The meaning sought to be conveyed by the words referred to undoubtedly is that, in determining the rate as well as the exemption, all debts and expenses payable in the course of administration and all existing liens, such as mortgages and Federal taxes, against the property must be deducted. In reaching this conclusion we are not unmindful of the rule that am-

biguities in an act of special taxation are to be construed in favor of the taxpayer. But in view of the fact that radical changes were made in the law as soon as the legislature met after the Holdridge decision was rendered, and the practical construction given the law, since amended, by the attorney general's office and the different probate courts for such a long period, we think, the interpretation now contended for by the state should be adopted.

The order of the probate court is reversed and the matter remanded with direction to compute the tax in harmony herewith. No statutory cost is allowed.

DIBELL, J. (concurring).

I concur in the result reached, but see no need of resting it upon practical construction.

STATE v. ROGERS & ROGERS.¹

May 27, 1921.

No. 22,179.

Food Control Act.

1. By the Food Control Act (40 St. 276, 41 St. 297), Congress, acting under the war power of the Constitution, authorized the taking control and regulation of the business of public stock-yards including the business of commission men buying and selling live stock there.

Warehouse Commission not authorized to fix commissions at public stock-yards.

2. Under such authority the government assumed control of the public stock-yards at South St. Paul and of the business of commission men doing business there, and during such control the state could not interfere by fixing and enforcing commission charges through the delegated authority of the Railroad and Warehouse Commission pursuant to Laws 1919 (Ex. Sess.) c. 39.

Act constitutional.

3. The business of commission men buying and selling stock at public stock-yards is so affected with a public interest that the state may fix

¹Reported in 182 N. W. 1005.

reasonable commission charges, and Laws 1919 (Ex. Sess. c. 39), giving the Railroad and Warehouse Commission authority to fix reasonable commission charges, is constitutional.

From an order of the Railroad and Warehouse Commission fixing the commissions to be charged by any live stock commission merchant at any public stock yard for the buying and selling of live stock, Rogers & Rogers appealed to the district court for Dakota county. The matter was heard by Converse, J., who vacated the order of the commission. From an order denying its motion for a new trial, the state appealed. Affirmed.

Clifford L. Hilton, Attorney General, and *Henry C. Flannery*, Assistant Attorney General, for appellant.

Moore, Oppenheimer & Peterson, for respondents.

DIBELL, J.

The defendants, commission men doing business at the South St. Paul stock-yards, appealed to the district court of Dakota county from an order of the Railroad and Warehouse Commission of date January 5, 1920, establishing, pursuant to the provisions of Laws 1919 (Ex. Sess. p. 58, c. 39), a schedule of charges for live stock commission men at public stock-yards. The district court vacated the order. The state appeals.

The questions, roughly stated, are whether Congress by the Food Control Act authorized control of public stock-yard facilities and activities including the business and charges of commission men; whether, if it did, such governmental control was taken of the stock-yards at South St. Paul and the business of commission men as to preclude the exercise of state authority under Laws 1919 (Ex. Sess. p. 58, c. 39), authorizing the Railroad and Warehouse Commission to fix commission charges; and whether, congressional action aside, the business at the stock-yards, so far as concerns the business of commission men, is of such a character that the state may regulate commission charges.

1. It was the purpose of the Food Control Act of August 10, 1917 (40 St. c. 53, p. 276), amended by the act of October 22, 1919 (41 St. c. 80, p. 297), sometimes referred to as the Lever Act, "to assure an ade-

quate supply and equitable distribution, and to facilitate the movement of foods, feeds," and many other articles specially enumerated having to do with the production of foods and feeds and fuel and in general designated in the act as "necessaries," to the end that the army and navy might be properly supplied and the war successfully prosecuted. It is the contention of the state that authority to deal with foods and feeds did not include authority to control live stock operations at terminal markets. We cannot agree with this contention. We give no narrow construction to the grant of power. Congress, acting under the war power of the Constitution, was mobilizing the resources of the nation in men and property and potential production with the purpose of rendering effective aid in the war into which it had lately entered, and it had in mind the encouragement of production and the conservation and effective distribution and economic use of food products essential to the carrying on of the war. With a like purpose Congress assumed control of the grain business, fixed the prices of grains, assumed charge of coal and metal production, took over the transportation business of the country, interstate and intrastate, and assumed control or regulation of various industrial operations not in times of peace considered at all public in character. It had as much in mind the control of dealings in live stock at terminal points as the control of finished food products or the control of grain prices and grain markets.

2. We need not enlarge upon the details of the control taken under the Lever Act. The record shows. What was done was in exercise of the war power, not in pursuance of the commerce clause. See *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897; *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. ed. 910, 4 L.R.A. 1623. The government assumed control of the stock-yards at South St. Paul along with other terminal stock-yards the country over. A representative was put there. He had an office force. The stock-yards and commission men acceded to the arrangement and co-operated as they ought. Licenses were required of commission men and by their terms they were revocable. Investigations were made. The commission men were required to make reports of prior business and of current business. Their books were examined. Regulations were made. The government did not change the current commis-

sion rates. It took care of individual cases and complaints as they arose. The government was active, not alone at South St. Paul, but at other live stock markets the country over. It is enough to say that its control was effective and complete and an accomplished fact. Effective control permitted no divided authority. *Northern Pac. Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502, 63 L. ed. 897; *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507, 63 L. ed. 910, 4 L.R.A. 1623. In the situation presented it was not for the state to fix and enforce commission rates during the period of government control which was rightly exclusive. The order establishing rates was invalid and was rightly vacated.

It may be noted that since the facts in this case arose the government has relinquished control of the South St. Paul yards and other yards.

3. The defendants attack the constitutional validity of Laws 1919 (Ex. Sess. p. 58, c. 39). If this act is unconstitutional the defendants should prevail, regardless of the other questions discussed.

The act provides for the licensing by the Railroad and Warehouse Commission of all commission merchants, brokers, etc., engaged in handling consignments of live stock at public stock-yards and the fixing of reasonable commission charges. Prior to this it had defined public stock-yards, placed them under control of the Railroad and Warehouse Commission, and provided for the fixing of reasonable charges. Laws 1919, p. 554, c. 461.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, is the leading case upon the authority of a state under its police power to regulate charges for facilities furnished and services rendered in certain lines of business affected with a public interest. There the court had under consideration maximum charges for the handling and storage of grain in public elevators at Chicago fixed under legislative authority. In discussing the basis of the constitutional regulation of charges the court said [p. 126]: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest

in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

Holdings similar to the holding in the Munn Case, and in some respects more comprehensive, were made in *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, affirming 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. 460, and in *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757, affirming 2 N. D. 482, 52 N. W. 408. These cases established the proposition that the business regulated need not be monopolistic in effect nor one upon which special privileges were conferred by law.

In *Cotting v. Kansas City Stock-yards Co.* 82 Fed. 850, it was held that the state might fix the charges of a stock-yards company. This case was reversed in *Cotting v. Kansas City Stock-yards Co.* 183 U. S. 79, 22 Sup. Ct. 30, 46 L. ed. 92, upon a point aside from that just noted. And in referring to the question of control the court said: "Tested by the rule laid down in *Munn v. Illinois*, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stock-yards company. Its stock-yards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and, therefore, must be considered as subject to governmental regulation."

The propriety of the regulation of the grain trade and of the business of commission men engaged therein, is declared by statute and recognized by the courts of this state. The state may require the owner of a country elevator to take out a license. *State v. W. W. Cargill Co.* 77 Minn. 223, 79 N. W. 962, affirmed in 180 U. S. 452, 21 Sup. Ct. 423, 45 L. ed. 619. So it may require a commission merchant to take out a license and execute a bond. *State v. Wagener*, 77 Minn. 483, 80 N. W. 633, 778, 1134, 46 L.R.A. 442, 77 Am. St. 681; *Farmers Co-op. Elev. Co. v. Enge*, 122 Minn. 316, 142 N. W. 328, 126 Minn. 485, 148 N. W. 465. He may be required to render a true statement to his consignor. *State v. Edwards*, 94 Minn. 225, 102 N. W. 697, 69 L.R.A. 667. Because of the public interest involved a weighmaster's certificate may be

made evidence of weight. *Vega Steamship Co. v. Consolidated Elev. Co.* 75 Minn. 308, 77 N. W. 973, 43 L.R.A. 843, 74 Am. St. 484.

In *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331, Justice Mitchell said: "The right of the state, in the exercise of its police power, to regulate the business of receiving, weighing, inspecting, and storing grain for others, in elevators or warehouses, as being a business affected with a public interest, is now settled beyond all controversy. This power extends even to fixing the charges for such services."

In *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011, L.R.A. 1915C, 1189, where the right of the state to regulate insurance rates was upheld, the court declined to limit the legislative power of regulation to cases where the right to demand and receive service existed in the public, or to cases where a special privilege was conferred by the public, and [p. 411], quoting the language of *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L.R.A. 559, 15 Am. St. 460, to the effect that "the underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation," and commenting upon various other cases, said: "They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation."

Public stock-yards are essential to effective commerce in live stock. There buyer and seller meet. It has come about that commission men do the buying and selling. The business of a stock-yards company and the business of commission men are interrelated and interdependent. A stock-yards business is necessarily localized. There commission men congregate and have their exchanges. It can be effectively operated only at transportation centers. The country over they are not numerous. The great public stock-yards of the country, as has been remarked of grain elevators, stand in the gateways of commerce. They must be used by the public. It is only in a legal sense that it can be said that the public may deal with them or not, as it chooses. Practically there is no alternative. In this sense they are necessarily monopolistic. They are like the instrumentalities of the grain trade at terminal points. Buyers and sellers are necessarily dependent upon them. Their business is public in the sense that elevators at terminal points are public. The

producing public is necessarily dependent upon them for an outlet for their livestock products, and the stock buying public is dependent upon them as a source of supply. The business is so affected with a public interest that the legislature may provide for its control and regulation and for the fixing of reasonable commission charges. The question of the power to regulate is a judicial one. The question of policy in its exercise is legislative. If the charges fixed are unreasonable or confiscation results the parties affected look to the courts.

Order affirmed.

ILLINOIS STEEL WAREHOUSE COMPANY v. HENNEPIN
LUMBER COMPANY AND OTHERS.

HENNEPIN LUMBER COMPANY, APPELLANT.¹

May 27, 1921.

No. 22,195.

Mechanic's lien — distinction between contractor and materialman.

1. One who contracts to furnish the steel work for a building and who is required by his contract to "fabricate" a substantial part of it according to the plans and specifications for the building, is a contractor as distinguished from a materialman under the mechanics' lien law.

Broker and subcontractor.

2. That such contractor is a broker, not engaged in that sort of work, and performs his contract through a subcontractor, does not change his relation to the building from that of a contractor to that of a materialman.

Lien for material furnished second subcontractor.

3. One who furnishes material for a building at the instance of a subcontractor in the second degree is entitled to a lien therefor under the statute.

Findings sustained.

4. The evidence sustains the findings of the trial court.

¹Reported in 182 N. W. 994.

Action in the district court for Ramsey county to recover \$457.36 against A. F. Boorman and to foreclose a mechanic's lien for the same. The case was tried before Olin B. Lewis, J., who made findings and ordered judgment in favor of plaintiff. From the order, as amended, denying its motion for amended findings and conclusions or for a new trial, Hennepin Lumber Company appealed. Affirmed.

Josiah E. Brill, for appellant.

Davis, Severance & Morgan, and *Mead & Bryngelson*, for respondents.

TAYLOR, C.

This is an action to enforce a mechanic's lien against a building in the city of St. Paul belonging to the defendant, Hennepin Lumber Company, known as the Tazewell Apartments. The trial court made findings of fact and conclusions of law, and directed the entry of a judgment establishing the lien and decreeing that the property be sold to satisfy it. The defendant, Hennepin Lumber Company, appeals from an order denying a new trial.

One Wilkinson had charge of the construction of the building for the lumber company, but in what capacity does not appear very clearly and is not very important as his authority is unquestioned. He was designated as the superintendent in charge of the job by the president of the lumber company. He was referred to by another witness as having the contract on a commission basis. Wilkinson made a contract with the Avery Steel Company to furnish the steel work for the building. The Avery Steel Company dealt in structural steel as a broker, and neither manufactured it nor kept it in stock for sale. The Avery Steel Company sublet its contract to furnish the steel work for the building to A. F. Boorman. Boorman had a shop in which he made plate and sheet steel into structural steel of various sorts used in the construction of buildings. He prepared and furnished from his own shop what the parties have termed the "fabricated" steel and purchased the remainder from plaintiff. Plaintiff is a dealer in structural steel, and keeps material in stock in the form of long bars and strips which it cuts into any lengths desired by the purchaser. It cut the steel which it furnished for this building into the lengths required by the plans and specifications and delivered it at the building. The lumber company, by arrangement with

the Avery Company, paid Boorman in full for all the steel furnished for the building and also paid the Avery Company the full balance due that company over and above the amount paid Boorman. Shortly after completing the work, Boorman became insolvent and was adjudged a bankrupt. He had made various payments to plaintiff, but still owed plaintiff for a considerable quantity of the steel furnished for the building. Plaintiff filed a lien against the property for the balance due, and brought this action to enforce it.

Appellant contends:

(1) That Boorman, out of money received from appellant, made payments to plaintiff with instructions to apply them on the purchase price of the steel in question sufficient in amount to pay plaintiff's claim in full if they had been applied as directed, but that plaintiff wrongfully applied them upon other claims which it held against Boorman.

(2) That appellant did not make the final payment to Boorman until advised by plaintiff that it could safely do so, and that plaintiff is now estopped from asserting a lien against the property; and

(3) That plaintiff is not within the class of persons to whom the statute gives a lien.

In respect to the first and second contentions, it is sufficient to say that the court found the facts against the appellant; that the evidence relating thereto is conflicting; and that the findings cannot be disturbed for that reason.

Appellant contends that plaintiff was neither a subcontractor nor a materialman within the meaning of the lien law; that plaintiff was merely a dealer in material who sold articles carried in stock to another dealer who purchased them for the purpose of reselling them; and that under the doctrine of *Ryan Drug Co. v. Rowe*, 66 Minn. 480, 69 N. W. 468, and *Forman v. St. Germain*, 81 Minn. 26, 83 N. W. 438, a dealer who sells to another dealer material carried in stock for sale is not entitled to a lien on the building in which the material is used, although the second dealer purchased it for the purpose of furnishing it for use in the construction of that building. If we concede the assumptions of fact, appellant's conclusion is correct.

The statute [G. S. 1913, § 7020], provides that: "Whoever contributes to the improvement of real estate by performing labor, or fur-

nishing skill, material or machinery, * * * whether under a contract with the owner of such real estate or at the instance of any agent, trustee, contractor, or subcontractor of such owner, shall have a lien * * * for the price or value of such contribution."

The contract with the Avery company to furnish the steel work for the building was made by Wilkinson. Whether Wilkinson made this contract as the representative of the lumber company or in his own behalf does not directly appear, but he apparently made it as the representative of the lumber company, for the managing officer of that company referred to him as the superintendent in charge of the job, and that company recognized the contract as its own by itself making all payments provided for therein directly to the Avery Company and Boorman. But if Wilkinson acted in his own behalf, instead of acting in behalf of the owner, it would not change the result under the facts of this case.

That the "fabrication" of the steel as required by the contract involved the doing of work of a character which placed the one who undertook to furnish it, "fabricated" ready for use in the construction of the building, in the class of contractors as distinguished from the class of materialmen within the meaning of the lien law, is not seriously questioned. The claim is that the Avery Company was a materialman because it was a broker and did none of this sort of work, but sublet the contract for doing it to another.

Whether the Avery Company was a contractor or a materialman, within the meaning of the lien law, depends on the nature of the contract which it undertook to perform. It contracted to furnish a substantial part of the steel "fabricated" as required by the plans and specifications. This necessarily required the company to do the work of "fabrication," or cause it to be done, and placed the company in the class of contractors as distinguished from the class of materialmen under the lien law. That the company, instead of performing the contract itself, performed it through a subcontractor did not relieve the company from its obligation to do the "fabricating," nor change its relation to the building from that of a contractor to that of a materialman. It follows that Boorman, to whom the contract was sublet by the Avery Company and who actually performed it, was a subcontractor within the lien law. *Pittsburg Plate Glass Co. v. Sisters of S. M.* 83 Minn. 29, 85 N. W.

829. Whether he was a subcontractor in the first or second degree is immaterial. *Spafford v. Duluth, R. W. & S. Ry. Co.* 48 Minn. 515, 51 N. W. 469. Plaintiff having furnished the material in question at the instance of Boorman, a subcontractor, was a materialman within the meaning of the statute and entitled to a lien thereunder.

Order affirmed.

RICHARD GLAUBITZ v. CHARLES H. MEYER.¹

May 27, 1921.

No. 22,214.

Breach of cropper's contract — complaint — general and special damages.

The parties made a contract under which plaintiff was to take possession of defendant's farm, paying a cash rent for the pasture and meadow land and delivering one-half of the crops harvested to defendant, the latter to furnish the seed and pay one-half of the threshing bill. Defendant refused to let plaintiff into possession and in this action for damages it is *held*:

(1) As against objection first made on the trial the complaint is sufficient to allow proof of special and general damages.

(2) The evidence did not justify the submission of special damages, there being no proof that defendant knew that plaintiff had the stock on account of which the damages were claimed, either when the contract was made or when breached.

(3) The measure of general damages was the difference between the actual rental value at the time of the breach and the rent or compensation reserved in the contract, and the charge was misleading in suggesting that in addition profits might be added.

Action in the district court for Blue Earth county to recover \$1,775 for breach of contract. The facts are stated in the opinion. The case was tried before Comstock, J., who when plaintiff rested denied defendant's motion for dismissal and at the close of the testimony his motion for a directed verdict, and plaintiff's motion for a directed verdict. The jury returned a general verdict for \$800 in favor of plaintiff and a special

¹Reported in 182 N. W. 1002.

verdict as stated in the fourth paragraph of the opinion. From an order denying his motion for judgment notwithstanding the verdicts or for a new trial, defendant appealed. Reversed and new trial ordered.

H. L. & J. W. Schmitt & H. W. Volk, for appellant.

C. J. Laurisch, Ivan Bowen and Le Roy Bowen, for respondent.

HOLT, J.

Plaintiff recovered a verdict for breach of contract and defendant appeals from the order denying his motion in the alternative for judgment or a new trial.

On June 28, 1918, the parties hereto entered into a written contract whereby plaintiff undertook to "well and faithfully till and farm, during the season of farming, in the year 1919, commencing Sept. 15th, 1918, and ending Sept. 15th, 1921, in a good and husband-like manner," a 240-acre farm owned by defendant in Blue Earth county, with a provision that if defendant sold the farm the contract should end. Defendant was to furnish the seed and pay one-half the threshing bill. The crops were to be shared equally. For the pasture and hay land plaintiff was to pay \$400 each year. No further reference need be made to the many stipulations in the contract, for they have no bearing on the questions presented by the appeal. When the time arrived for plaintiff to take possession, defendant refused to let him enter. This action resulted, wherein a verdict of \$800 was given plaintiff.

The complaint alleged the making of the contract; plaintiff's readiness to perform; defendant's breach; that plaintiff, in reliance on the contract, had purchased a large amount of live stock and farm implements to carry on the farm; that, because defendant refused to let plaintiff enter and occupy the farm, the latter was compelled to sell at great sacrifice certain of the stock mentioned, to his damage in the sum of \$775. Also that, by reason of defendant's refusal to let plaintiff in, plaintiff was compelled to lease an inferior farm and forego the opportunity to employ himself, his teams and machinery profitably upon defendant's farm, to plaintiff's damage in the sum of \$1,000. The answer, in substance, admitted the execution of the contract, but averred that it was agreed that defendant might continue to reside in part of the farm dwelling until March 1, 1919, also that plaintiff should begin plowing

the stubble fields immediately after the harvesting of the small grain, and should prepare the ground and seed, not later than the fore part of September, 1918, 25 to 30 acres of winter rye, but that through mutual mistake and inadvertence these terms were omitted from the contract. It is alleged that the terms mentioned were violated by plaintiff, and because thereof defendant terminated the contract on September 21, 1918. Defendant asked for reformation of the contract by the insertion of the alleged omitted terms and for a dismissal. The reply was a general denial.

In addition to the general verdict, there was a special verdict wherein the jury found that no agreement was made as to the plowing nor as to the seeding of rye, but that it was agreed orally that defendant might have possession of the dwelling house until March 1, 1919, plaintiff, however, to have three rooms therein and room in the barn and on the premises for such stock and farm property as he desired to bring there.

The evidence sustains the finding necessarily embodied in the verdict, that defendant and not plaintiff breached the contract. That being so, we are only concerned with the damages to which plaintiff was entitled under the pleading and the evidence, if properly admitted and correctly submitted to the jury.

As against objection first made on the trial, we think, the complaint should be held to state a cause of action for special damages; and, in the sixth paragraph, also one for general damages where it is alleged that "by reason of defendant's failure and refusal to permit plaintiff to seed, cultivate and farm said farm for and during the times set forth in said lease, plaintiff has been damaged in the sum of one thousand dollars."

But, even though the complaint be held to sufficiently plead special damages, the evidence did not warrant the submission of the recovery of such damages to the jury. Plaintiff testified that because on the farm to which he went, when prevented to take possession of defendant's, the barn and hog-house were too small to house all his cows and hogs, he was compelled to sell at a loss certain animals before they were ready for market and when the price was unfavorable. However, the record is barren of any proof that defendant was informed of or knew what stock plaintiff had or intended to keep on the farm at the time the contract was made, or even at the time it was breached. In the absence of such

proof special damages may not be recovered. 8 R. C. L. 459-461, §§ 27, 28. Dreyer Commission Co. v. Fruen Cereal Co. 148 Minn. 443, 182 N. W. 520.

This defect in the proof necessarily results in a new trial, for it is impossible to determine how much was allowed on that score. But there were errors also in the admission of proof in respect to general damages and the instructions given the jury for assessing the same.

Where the rent is money the general damages for a lessor's refusal to let the lessee into possession would be the amount, if any, that the fair rental value of the term exceeds the stipulated rent. In other words, the recovery is limited to the loss of the bargain as the same was when the breach occurred. In the instant case the proposition is complicated somewhat by the fact that for part of the land there was a cash rental and for part a share of crop was to be given. But we think that does not change the rule, which simplified to apply to this case would be this: What price or premium would plaintiff's contract have brought at the time defendant breached it, assuming the purchaser then could have had possession freely? We think there is no room for a distinction between this contract and the ordinary lease because of the crop sharing provision. The increased rental value at the time of the breach over that stipulated when the contract was made, measures the general damages. Knowles v. Steele, 59 Minn. 452, 61 N. W. 557; Alexander v. Bishop, 59 Iowa, 572, 13 N. W. 714; Smith v. Hughey, 66 Ore. 408, 134 Pac. 781, and note thereto in Ann. Cas. 1915B, 804; Jonas v. Noel, 98 Tenn. 440, 39 S. W. 724, 36 L.R.A. 862.

To attempt to measure the general damages by the probable profits to be had from a performance of this contract, involves too many uncertain factors, such as fluctuations in the price for both labor and crop, the weather conditions and other matters affecting the yield. Since a large part of the rent here was payable in cash, there would seem to be no impropriety in considering what would have been the whole rent in cash per year at the time the contract was made, on the assumption that such rental would presumptively be the equivalent in value to the value of the crop share and money to be received by defendant. The difference, then, if any, between the amount so found and the cash rental value at the time of the breach, would represent the general damages,

or the monetary value of the contract when breached. The learned trial court did not so submit the case, but charged: "If there were any appreciable increase in the rental value of that farm during the time, during that year (September 15, 1918, to September 15, 1919), and if such lease were wrongfully terminated by defendant, then the plaintiff would be entitled to the benefit, that increased rental value of the farm during that period."

We think the increase must be limited to the time the breach occurred, and is not to be estimated at what thereafter it might advance to. And in the next paragraph the court used language which might mislead the jury to add also profits derived from operating the farm, for they were to determine the cost to plaintiff of performing the contract for that year and the reasonable worth and value of the use of the farm, and, if the latter was greater, plaintiff was entitled to the benefit of the difference. This not only gave the plaintiff the increase in rental value, but also suggests profits that, perchance, could have been made. He certainly was not entitled to both, and, for the reason already stated, no damages for conjectural profits should be permitted.

Since a new trial must be had it will not be necessary to consider the other errors assigned, mostly relating to rulings on the admissibility of testimony, for they are not of a sort likely again to cause complaint.

It may be stated that, since the contract provides for a termination, if defendant sold the farm, he should have been permitted to prove that it was sold before the first rental year expired, and if an amendment to the answer was needed to let in the proof the amendment should have been granted.

The order is reversed and a new trial granted.

LOUIS CHILDS v. STANDARD OIL COMPANY¹.

May-27, 1921.

No. 22,216.

Negligence in filling oil tank — proximate cause of fire.

Defendant's driver, in filling a tank with kerosene, negligently permitted the oil to overflow. The tank was in the basement of a building occupied by plaintiff and others. Employees of the owner of the tank soaked up the oil with sawdust and shavings, some of which were left near a furnace located in the basement. In replenishing the fire in the furnace, an occupant of the building used a shovel with which the oily sawdust had presumably been scraped together. There was an instantaneous fire, and the building and plaintiff's property therein were destroyed. *Held:*

(1) That the outbreak of a fire was within the range of reasonable foresight and that a jury might have found that defendant was bound to anticipate it as probable.

(2) That the fact that damage would not have happened but for defendant's original negligent act did not, as a matter of law, necessitate the conclusion that such act was the proximate cause of plaintiff's injury.

(3) That the owner of the tank who attempted to remove the oil and the occupant of the building who added fuel to the furnace fire were independent responsible agents whose acts intervened between defendant's negligence and plaintiff's injury, and hence the negligence of the defendant was not the proximate cause of the injury.

Action in the district court for Itasca county to recover \$400 for loss caused by defendant's negligence. The case was tried before McClenahan, J., who when plaintiff rested granted defendant's motion to dismiss the action. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

John M. Gannon and Thomas H. Strizich, for appellant.

Thomas S. Wood and G. A. E. Finlayson, for respondent.

¹Reported in 182 N. W. 1000.

LEES, C.

Appeal from an order denying plaintiff's motion for a new trial of an action for damages for the destruction of his property by a fire alleged to have been caused by defendant's negligence. On defendant's motion, the action was dismissed at the close of plaintiff's case.

In substance the evidence was that defendant operated an oil station at Coleraine in this state, from which it distributed oil in neighboring towns. Among them was the village of Marble, where the Marble Mercantile Company conducted a general store, occupying a portion of a three-story brick building. There was a cement-floored basement under the building divided by a partition wall into two sections, the one under the store being used by the company, and the other by Mrs. Horn, who occupied the remainder of the building as an hotel. Plaintiff leased rooms from her, where he kept his household goods and clothing, which were destroyed by the fire. The mercantile company kept kerosene in its basement in a 300 gallon tank, which was filled through an intake pipe leading to the surface of the ground. A gauge on the tank indicated the amount of oil it contained. Defendant usually filled the tank twice a week. There was evidence tending to show that it was the practice of defendant's drivers to go into the basement to look at the gauge to see how much oil was needed before filling the tank.

On February 14, 1919, at about the noon hour, defendant's driver delivered and was paid for 100 gallons of oil. At about one o'clock an employee of the mercantile company discovered that too much oil had been poured into the tank, which had overflowed, and that several gallons of oil had run over the floor. In the partition between the two sections of the basement, there was a door, which cleared the floor by about one inch. The tank was near the door, and the floor sloped towards it, and some of the oil had run into the other section of the basement and near the furnace by which the entire building was heated. Employees of the mercantile company attempted to remove the oil by spreading sawdust and shavings over the floor to soak it up. They then scraped up this material and left it in the basement. At about five o'clock Mrs. Horn went to the basement to attend to the furnace. She had been down earlier in the afternoon, knew that the oil had overflowed, and, on going down the second time, found oily sawdust near the furnace. She proceeded to

add fuel to the fire. In doing so, a stick of wood stuck in the furnace door. She took a shovel, which had probably been used to scrape up the oil, and tried to shove the stick through the door. There was a burst of flame and almost immediately there was fire all through the basement and the entire building and its contents were destroyed.

The present action was one of several brought by occupants of the burned building. One, in which Margaret McPhearson was plaintiff, had been tried. An employe of the mercantile company named Sternberg had been a witness for her and testified that he gave defendant's driver Kernan an order for 100 gallons of kerosene on the day of the fire. We infer that after the trial of the McPhearson case the complaint in this case was amended so as to plead defendant's usage in filling the mercantile company's tank. Sternberg was not called as a witness in this case. We will assume that the evidence would have justified the jury in finding that it was defendant's practice to fill all oil tanks in the manner alleged in the amended complaint and that the driver Kernan, who had been recently employed by defendant, followed the customary practice on the day of the fire and negligently filled the tank so that it overflowed.

This brings us to a consideration of the question of whether such negligence was actionable in view of what followed. So much has been written on the question of "whether a particular mischief was the result of a particular default" that stereotyped forms of expression can be found to glide over almost any difficulty the question may present in any case. 25 Harvard, L. Rev. 108. We are content to refer to our own decisions for definitions of such terms as "foreseeable consequences," "proximate cause" and "intervening cause."

In *Christianson v. Chicago, St. P. M. & O. Ry. Co.* 67 Minn. 94, 69 N. W. 640, the court said: "If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not."

In *Wallin v. Eastern Ry. Co. of Minn.* 83 Minn. 149, 86 N. W. 76, 54 L.R.A. 481, the following statement was approved: "A person guilty

of negligence should be held responsible for all the consequences which a prudent and experienced person, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would at the time of the negligent act have thought reasonably possible to follow, if they had occurred to his mind."

In *Boyd v. City of Duluth*, 126 Minn. 33, 147 N. W. 710, the doctrine of *Stone v. Boston & A. R. Co.* 171 Mass. 536, 51 N. E. 1, 41 L.R.A. 794, was approved as follows: "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable."

In *Conley v. Louis F. Dow Co.* 130 Minn. 186, 153 N. W. 323, 593, the court remarked: "It is truly said, defendant was not required to anticipate improbable dangers."

In *Beard v. Chicago, M. & St. P. Ry. Co.* 134 Minn. 162, 158 N. W. 815, L.R.A. 1916F, 866, the rule stated in the *Christianson* case was reaffirmed.

Applying these rules, we are of the opinion that the jury might properly have concluded that it would have occurred to a man of ordinary prudence that, if a quantity of kerosene was spilled, as it was in this case, and was not promptly and carefully removed, a fire was likely to originate in the basement of the building. The mischief which might result was well within the range of reasonable foresight, and we think the jury might have found that defendant was bound to anticipate it as probable.

With reference to the subject of proximate cause, the late Chief Justice Start said, in *Moore v. Northern Pacific Ry. Co.* 108 Minn. 100, 121 N. W. 392: "Theorize as we may on the subject of proximate cause, it is in its last analysis a question of good common sense, to be solved by a practical consideration of the evidence in each particular case."

Substantially the same statement was repeated in *Healy v. Hoy*, 115 Minn. 321, 132 N. W. 208; *Wiles v. Great Northern Ry. Co.* 125 Minn. 348, 147 N. W. 427; and *Farrell v. G. O. Miller Co.* 147 Minn. 52, 179 N. W. 566. Definitions of "proximate cause," approved by this

court in negligence cases, are collected in 2 Dunnell, Minn. Dig § 7000.

The fact that damage would not have happened but for defendant's tortious act does not, as a matter of law, necessitate the conclusion that such act was the proximate cause of the damage. If it only became injurious through some distinct wrongful act or neglect of another, the last wrong is the proximate cause, and the injury will be imputed to it and not to that which is more remote. The test usually applied is this: Has an independent responsible agent intervened between the first wrongdoer and the plaintiff and the continuous sequence of events been interrupted or turned aside so as to produce a result which would not otherwise have followed? If so, the original wrongdoer ceases to be responsible. *Moon v. Northern Pacific R. Co.* 46 Minn. 106, 48 N. W. 679, 24 Am. St. 194; *Purcell v. St. Paul City Ry. Co.* 48 Minn. 134, 50 N. W. 1034, 16 L.R.A. 203; *Gillespie v. Great Northern Ry. Co.* 124 Minn. 1, 144 N. W. 466; *Peterson v. Martin*, 138 Minn. 195, 164 N. W. 813. The authorities agree that the question of proximate cause is usually one of fact for the jury and that only when the facts are undisputed and are susceptible of but one inference does the question become one of law for the court. The cases are collected in 2 Dunnell, Minn. Dig. § 7011, and 22 R. C. L. 148-150.

Defendant contends that the evidence is conclusive that the acts of the employees of the mercantile company in attempting to remove the oil from the floor, and of Mrs. Horn in attempting to add fuel to the fire in the furnace, were the proximate causes of the injury to plaintiff. In support of this contention it relies principally on the following cases: *Peterson v. Martin*, supra; *Stone v. Boston & A. R. Co.* supra; *Moody v. Gulf Refining Co.* 142 Tenn. 280, 218 S. W. 817, 8 A. L. R. 1243, to which may be added *Harton v. Forest City Tel. Co.* 146 N. C. 429, 59 S. E. 1022, 14 L.R.A.(N.S.) 956, 14 Ann. Cas. 390. It is the opinion of the majority of the court that the contention should be sustained.

The employees of the mercantile company discovered the oil early in the afternoon. They set about removing it, but stopped when they had transferred it from the floor to the sawdust and shavings. They negligently left some of the oil-soaked substance close to the furnace, thereby adding a new element of danger. The condition they created early

in the afternoon was allowed to continue for several hours. These were distinct acts of negligence intervening between the original negligent act of the defendant and the final injurious consequence. Then, too, Mrs. Horn was an independent responsible agent whose negligent act intervened and was the immediate cause of the fire. She knew the oil had been spilled and soaked up with sawdust and shavings, some of which were near the furnace. While there is no direct proof that particles of oily sawdust adhered to the shovel she used, the burst of flame, when she thrust the shovel through the furnace door, clearly indicated that there was some inflammable substance on it. She was negligent in what she did. Her negligence and the negligence of the mercantile company's employes "insulated" the original negligent act of the defendant from the injury and relieved defendant of liability.

There is no dispute about the facts, and the only permissible inference which the jury might have reached was that defendant's negligence was not a proximate cause of plaintiff's injury.

Order affirmed.

DIBELL, J. (dissenting).

In my judgment the question of proximate cause was for the jury.

HALLAM, J. (dissenting).

I agree with Justice Dibell.

THE FARMERS CO-OPERATIVE EXCHANGE COMPANY OF
GOOD THUNDER v. FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.¹

May 27, 1921.

No. 22,229.

When verified pleading is competent evidence in another action.

1. A pleading made and verified by a party in another action is competent evidence, so far as relevant, in an action to which he is a party.

Charge to jury — what constitutes ratification.

2. An instruction to the effect that, to constitute a ratification of a

¹Reported in 182 N. W. 1008.

transaction, requires an acceptance on the part of the plaintiff of the fruits and benefits of the transaction, was, under the evidence, prejudicial to the rights of the defendant.

Ratification of unauthorized act of agent.

3. To ratify the act of an agent is to confirm, approve or sanction a previous act done in behalf of the principal without authority. There can be no ratification of a contract which could not have been made binding on the ratifier at the time it was made.

Action in the district court for Blue Earth county to recover \$2,500 upon an indemnity bond. The case was tried before Comstock, J., and a jury which returned a verdict for the amount demanded. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

H. V. Mercer & Co., H. L. & J. W. Schmitt and H. W. Volk, for appellant.

Ivan Bowen and S. B. Wilson, for respondent.

QUINN, J.

Action to recover upon an indemnity bond issued by defendant to the plaintiff to cover loss by larceny or embezzlement through its agent, Emil O. Rosnow. Plaintiff recovered a verdict and from an order denying its motion for judgment or a new trial, defendant appeals.

Plaintiff is engaged in operating a grain elevator at Good Thunder, in buying, selling and handling grains for present and future delivery. Rosnow was employed as its manager, and as such had charge of its affairs, with authority to issue checks, buy, ship and sell grains and to hedge on the market so as to protect purchases, subject to the order of the board of directors and the president. On March 30, 1917, defendant, in consideration of plaintiff's application and the payment of \$37.50 premium, executed its bond in the form attached to the complaint, whereby it obligated itself to reimburse plaintiff to the extent of \$2,500 for such pecuniary loss as it might sustain by reason of any larceny or embezzlement on the part of such agent in connection with his duties between March 30, 1917, and March 30, 1918, at 12 o'clock, noon.

The books, records and auditing reports pertaining to plaintiff's business were placed in evidence. They showed that hedging transactions

and shipping of grain had been carried on with divers firms, including E. W. Wagner & Company, by such manager during the year 1916, and up to March, 1917; that profits and losses had been sustained thereon; and that hedges were outstanding at the time of the taking effect of the bond in question.

On April 11, 1917, car No. 18,843 was loaded with wheat, billed and shipped from plaintiff's elevator by Rosnow to E. W. Wagner & Company at Minneapolis, in the usual way. On April 26 and 28, Rosnow drew two checks against plaintiff's bank account in the State Bank of Good Thunder for \$2,200 and \$2,000, respectively, payable to E. W. Wagner & Company, or order, and transmitted the same to that firm at Mankato to cover hedges. These checks were presented to the bank at Good Thunder for payment on May 1, 1917. The cashier of that bank immediately notified Rosnow of the receipt of the checks and informed him that they would create an overdraft exceeding \$4,000. Rosnow then called the directors of plaintiff together. The cashier appeared before the board with the checks, and informed it that to pay the same would cause an overdraft, and asked that they provide the funds therefor. The directors finally decided to make a draft on the John Miller Company, of Minneapolis, to take care of the checks, which was done. The Miller Company refused to honor the draft, and later the board raised funds sufficient for the purpose by the sale of stock.

On May 2 after arrangement had been made for the payment of the two checks, the president and two directors of plaintiff went to the office of Wagner & Company at Mankato, and demanded the return of the car of wheat or the proceeds of the sale thereof. Subsequently suit was brought by the plaintiff against Wagner & Company to recover the proceeds of the sale of the wheat, claiming that the same had been sold for and on behalf of the plaintiff. The defendant answered, claiming the right to retain the proceeds of the sale of the wheat to apply upon account then due it from plaintiff. Upon trial of the instant case defendant offered the complaint in that suit in evidence, which upon objection was ruled out. This ruling is assigned as error. Defendant further contends that the transaction pursuant to which the checks were given, was not covered by the bond, since the hedgings were outstanding at the time the bond took effect, they having been made in the regular

course of plaintiff's business. It further contends that the giving of the checks was ratified by the acts of plaintiff at the time payment was arranged for, and that the evidence in the case, taken as a whole, is not sufficient to sustain a recovery.

The bringing of the suit against Wagner & Company was authorized by plaintiff's board of directors. It was alleged in the complaint that "plaintiff's agent sold and delivered to defendant" E. W. Wagner & Company the car of wheat in question, and a recovery of the proceeds thereof was demanded. The offer should have been received as bearing upon the question whether the car was shipped by the agent in the ordinary course of plaintiff's business, and as bearing upon ratification of the agent's act. It is a well settled rule that a pleading made and verified by a party in another action, is competent evidence, so far as relevant, in an action to which he is a party. *Siebert v. Leonard*, 21 Minn. 442; *Rich v. City of Minneapolis*, 40 Minn. 82, 41 N. W. 455; *Humphrey v. Monida & G. Co.* 115 Minn. 18, 131 N. W. 498. A copy of the shipping bill upon which the wheat was transported is in evidence. It appears therefrom that the car was shipped from the Farmers Co-operative Exchange Company, at Good Thunder, Minnesota, on April 11, 1917, in apparent good condition, to E. W. Wagner & Company, at Minneapolis, per E. O. Rosnow, agent. The car was received by that company, and, after the difficulty over the two checks arose on May 1, plaintiff demanded return of the wheat from Wagner & Company, or the proceeds from the sale thereof, and subsequently brought suit to recover the proceeds. We are unable to discover any testimony in the record tending to show that Rosnow ever received any part of such grain or the proceeds derived therefrom. If he has never received the proceeds and did not ship the car to Wagner & Company for the purpose of having the proceeds applied on his past indebtedness, then he never embezzled the grain.

It is insisted that the proofs show conclusively that the transaction for which the checks were given was a gambling transaction and covered by the bond, while it is earnestly contended on behalf of defendant that they were given to cover hedges made in plaintiff's business prior to the date of the bond, and that by its acts at the time of arranging for the payment of the same plaintiff ratified the transaction.

If the checks were given to cover hedges made to protect plaintiff against loss on grain purchased, they were legal, notwithstanding the fact that they were payable to a party with whom Rosnow was not specifically instructed to transact business. Rosnow, as appears from the testimony of the president, was expected to protect his purchases of grain by hedging, and the mere fact that the checks were made payable and delivered to Wagner & Company, would not render them unauthentic. Nor would the fact, standing alone, be any evidence that they were unlawfully issued. The claim that Rosnow had no authority to ship grain to, or deal in any manner with, Wagner & Company, became an issue on the trial, and in relation thereto the court submitted to the jury whether the dealings with that company were ratified by plaintiff.

In this connection it may be noticed that the books, records, auditor's reports, his testimony and the files show that, during the preceding year, hedges had been made and grain shipped to that company. Plaintiff had arrangements with Carl Flo to audit its books every three months. His last report was made in February, 1917. There was testimony that there were about 14,000 bushels of grain in plaintiff's elevator in January, 1917; that it was difficult to obtain cars; that the grain was largely shipped out during the first two or three months of the year; that the market was very panicky; that the witness Flo found a 2,000 bushel hedge that had not been taken up when the grain was sold, and that he had reported the same to Mr. Ulrich, one of plaintiff's directors. He further testified, in effect, that when he started to make his audit report Rosnow had given him the books, including the ledger, grain book, check stubs, deposit book, all the letter files, statements and confirmations that had been received from grain brokers; that in the course of his examination he found reports on future trades in the files, and that they were turned over to him and examined in connection with the books.

In submitting the question of ratification the court instructed the jury, among other things, as follows:

"The failure to disaffirm such unlawful act and the taking and keeping of the fruits or benefits of such unlawful act will deny the plaintiff the right to recover against the defendant if it is found by a fair preponderance or greater weight of the evidence in the case that the plaintiff accepted the fruits or benefits of such transaction and adopted and

ratified the transaction by such use and acceptance thereof * * * in the form suggested or by reason of the matters suggested, as the jury shall determine from all the evidence in the case.

"And you do not find that notwithstanding such larceny the plaintiff after notice thereof accepted the fruits and benefits thereof."

"If notwithstanding you shall find such larceny on the part of Rosnow you shall find by a greater weight of the evidence in the case that after knowledge or notice of the unlawful act or acts of Rosnow that the plaintiff accepted the fruits and benefits of such unlawful act and appropriated the same to its own use, then your verdict shall be for the defendant."

This instruction, as we read it, is tantamount to saying to the jury, that to constitute a ratification of a transaction requires an acceptance on the part of the plaintiff of the fruits and benefits of Rosnow's dealings with Wagner & Company. Under the evidence in this case the instructions must have been prejudicial to the defendant, as no benefits could have accrued to the plaintiff from the acts claimed. To ratify is to confirm, approve or sanction a previous act or an act done in behalf of the party ratifying, without sufficient authority. A party may ratify a contract only when it was originally made for him without authority. There can be no ratification of a contract which could not have been made binding on the ratifier at the time it was made. *McArthur v. Times Printing Co.* 48 Minn. 319, 322, 51 N. W. 216, 31 Am. St. 653; *Steffens v. Nelson*, 94 Minn. 365, 102 N. W. 871; 31 Cyc. 1245, 1247, and cases cited.

If Rosnow made hedgings with Wagner & Company without authority, but in such a way as to have been lawful if made in pursuance of authority, then the same would have been capable of ratification. There was evidence offered to the effect that the checks were given to cover past indebtedness of Rosnow's. If such testimony were true and plaintiff's directors authorized the bank to pay the checks and at the time had no knowledge or notice of such fact, the jury might find embezzlement. But, if the directors had knowledge or notice of that fact, there could be no embezzlement. In other words, if, with such knowledge or notice, plaintiff saw fit to honor the checks, it could not be said that Rosnow embezzled the money so advanced. We discover no proof in the record

that any hedgings were made subsequent to the date of the bond. If none were made subsequent to that date, then the matter covered by the checks must have antedated the giving of the bond and the defendant would not be liable, if the transaction were ratified by the plaintiff. We think the instructions were prejudicial to the rights of defendant.

Reversed.

**J. J. KIES v. CORDELIA WARRICK, INDIVIDUALLY, AND
CORDELIA WARRICK, AS EXECUTRIX OF THE LAST
WILL AND TESTAMENT OF ISAAC N. WARRICK,
DECEASED.¹**

May 27, 1921.

No. 22,247.

Contract of sale — deficiency in acreage — remedies of vendee.

1. Where a tract of land sold is described in the contract of sale as of a given quantity, and the quantity is in fact deficient, the purchaser may at his option have specific performance with pecuniary compensation or abatement of the price proportioned to the amount of the deficiency.

Plat — testimony of surveyor when his notes are not in evidence.

2. Where a surveyor surveyed land, made notes of his survey, and from those notes made a plat of the land showing the acreage, and he testifies that the plat correctly shows the acreage, the plat may be received in evidence, though the surveyor's notes are not in evidence. The surveyor may testify as to the number of acres in the tract, though his notes are not in evidence.

Specific performance — tender before suit unnecessary.

3. Plaintiff was not required to tender performance before suit for specific performance.

Same — when term has been omitted from contract by mistake.

4. In an action for specific performance, the fact that a provision favorable to the defendant has been omitted from the contract by mistake, is not a defense, if the plaintiff is ready, able and willing to perform the whole agreement including the omitted term.

¹Reported in 182 N. W. 998.

Action in the district court for Nobles county for specific performance of an agreement to sell land. The case was tried before Nelson, J., who when plaintiff rested denied defendants' motion to dismiss the action, made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Selover, Schultz & Mansfield, for appellants.

J. A. Town, E. J. Jones, and E. H. Nicholas, for respondent.

HALLAM, J.

On October 25, 1917, defendant, Cordelia Warrick, and her husband, Isaac Warrick, contracted to sell to plaintiff an irregular tract of land in Nobles county. This action was brought to compel specific performance of the agreement. From a judgment for plaintiff, defendants appeal.

There is evidence that, prior to the making of the contract sued on, the Warricks placed the land in the hands of John Mitchell, a land man of Worthington, for sale, and told him the tract contained 209 acres. Mitchell went to plaintiff and negotiated a sale at \$140 an acre, and told him the farm contained 209 acres, and drew a written contract of sale stipulating for a sale at \$140 an acre or \$29,260. Mitchell and plaintiff went together to procure the signatures of the Warricks to this contract, but the Warricks wanted more money. They demanded \$29,800. Plaintiff testified that he sat down with them and figured the price per acre on a basis of 209 acres at \$142.58 per acre, and then told them he would accept the offer. He then prepared a contract of sale which described the property according to government subdivisions and as "containing in all, two hundred and nine (209) acres." The price named in the contract was \$29,800, the sum of \$1,000 to be paid on execution of the contract, \$8,800 March 1, 1918, \$20,000 on or before March 1, 1928, with interest at 5½ per cent per annum.

Thereafter, two matters of controversy arose. Plaintiff had the land surveyed and claimed the acreage was only 203.17. There were mortgages upon the land aggregating above \$8,000 to one Patterson, due March 1, 1921, and the mortgagee would not accept the money and release the mortgages.

Plaintiff in his complaint asked that the court require defendants to give a deed of the premises described, that deduction be made from the price to be paid by plaintiff because of the shortage in the acreage and that the amount of the encumbrances upon the land be deducted from the purchase price. The court made its decree in accordance with these demands in the complaint.

The court found "that the price of the said land was computed upon the basis of 209 acres and that the price per acre so computed was \$142.58." Defendants challenge the part of this finding that the farm was sold "on an acreage basis, or for any particular price per acre." They contend that this finding is "absolutely without foundation in the evidence" and that "this being so, the whole fabric of plaintiff's case falls." There may be some question whether this contract can be considered technically a sale at the price of \$142.58 per acre, but in our opinion this is by no means decisive of the case. The contract does in express terms stipulate that the tract sold is described as "containing in all two hundred and nine (209) acres," and the tract in fact falls short by 5.83 acres.

We understand the rule to be that, where the tract sold is described as of a given quantity, that quantity is a material term of the contract, and, if it is in fact deficient in quantity, the court may, at the option of the purchaser, decree a conveyance, and allow the purchaser pecuniary compensation or abatement of price proportioned to the amount of the deficiency. *Pomeroy, Contracts, Specific Performance*, §§ 434-435, 438; *Warvelle, Vendors*, § 749; *Melin v. Woolley*, 103 Minn. 498, 115 N. W. 654, 946, 22 L.R.A.(N.S.) 595; *Tobin v. Larkin*, 183 Mass. 389, 67 N. E. 340; *Garrett v. Goff*, 61 W. Va. 221, 56 S. E. 351; *Docter v. Hellberg*, 65 Wis. 415, 27 N. W. 176; *Seegar v. Smith*, 78 Ga. 616, 3 S. E. 613; *Murphy v. Hohne*, 73 Fla. 803, 74 South. 973, L.R.A. 1917F, 594. This appeals to us as a just rule and we adopt it and hold that it is applicable, whether the land is sold by the acre or for a lump sum.

2. Defendants contend there is no competent evidence as to the acreage of the farm. A surveyor, H. W. Jones, gave evidence that he surveyed the farm and made notes and records of the survey at the time, and later from such original notes and records made a plat of the farm. This plat, he said, correctly showed the number of acres in the farm.

The plat was received in evidence and the witness was permitted to testify, without introduction of his notes in evidence, that he found in his survey that the farm contained 203.17 acres. There was no error. Where a surveyor testifies to the accuracy of a plat made by him, it is not ordinarily error to receive the plat in evidence, even though it was made from notes which are not in evidence. The sufficiency of the verification is a question addressed to the discretion of the trial judge. *Strasser v. Stabeck*, 112 Minn. 90, 127 N. W. 384; *Hall v. Conn. Mut. Life Ins. Co.* 76 Minn. 401, 79 N. W. 497; 22 C. J. 910. A witness who has made a survey of land for the purpose of determining its acreage and who has computed the acreage from measurements taken by him, may also testify as to the acreage found by him without introduction of the notes in evidence.

3. The other assignments of error do not require extended discussion. There is ample evidence that plaintiff was at all times ready, able and willing to carry out his contract. Plaintiff was not required to make tender of performance, *Lewis v. Prendergast*, 39 Minn. 301, 38 N. W. 802, and was never in default because defendants were never able to fully perform.

4. The contract, through mistake of parties, omitted to provide that the deferred payment shall be secured by a purchase money mortgage upon the land sold. Plaintiff conceded that this provision should have been in the contract, and the decree provides that the mortgage shall be given. Defendants have no ground for complaint. That a provision, favorable to the defendant, has been omitted by mistake, is not a defense, if the plaintiff is ready, able and willing to perform the whole agreement including the omitted term. 36 Cyc. 608; *Park v. Johnson*, 4 Allen (Mass.) 259; *Anderson v. Kennedy*, 51 Mich. 467, 16 N. W. 816.

Judgment affirmed.

METROPOLITAN MILK COMPANY AND ANOTHER v.
MINNEAPOLIS STREET RAILWAY COMPANY.¹

May 27, 1921.

No. 22.261.

**Workmen's Compensation Act — injury caused by third party — award
against third party.**

Under G. S. 1913, § 8229 (1), an employer against whom an award of periodical payments is made under the compensation act in favor of an employe or dependent, where the injury or death was caused by the negligence of a third party, all being under the compensation act, may have an award against the third party like that which the employe or dependent might have had, and need not await the payment of the entire amount due on the award against him before having his rights against the third party fixed and determined.

Action in the district court for Hennepin county to recover \$2,383 for compensation payments required of plaintiff because of the negligence of defendant's motorman. Defendant's motion to dismiss the action on the pleadings, on the grounds that the same did not state a cause of action against defendant and was prematurely brought, was granted, Hale, J. From the judgment dismissing the action, plaintiffs appealed. Reversed.

A. A. Tenner, for appellants.

Ralph T. Boardman and *W. D. Dwyer*, for respondent.

DIBELL, J.

This is an action by the Metropolitan Milk Company and the Continental Casualty Company against the Minneapolis Street Railway Company. On motion of the defendant it was dismissed before the introduction of testimony. Judgment was entered for the defendant and the plaintiffs appeal.

¹Reported in 183 N. W. 830.

The question is whether the complaint states facts entitling the plaintiffs to present relief. Briefly they are these:

Emery A. Johnson, an employe of the milk company, was killed through the negligence of the defendant street railway company on January 16, 1919. He and the milk company and the street railway company were subject to the Workmen's Compensation Act. The casualty company was the insurer for the milk company. On May 20, 1919, in proceedings under the compensation act, Clara Johnson, the mother and dependent of the deceased, was awarded compensation at the rate of \$7.60 per week during dependency, payable every four weeks for the period of 300 weeks. The milk company has paid all instalments which accrued prior to the commencement of this action.

The applicable provisions of the Workmen's Compensation Act are found in G. S. 1913, § 8229 (1), and are as follows:

"8229. (1) That where an injury or death for which compensation is payable under part 2 of this act is caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, such party also being subject to the provisions of part 2 of this act, the employe in case of injury or his dependents in case of death, may, at his or their option, proceed either at law against such party to recover damages, or against the employer for compensation under part 2 of this act, but not against both.

If the employe in case of injury, or his dependents in case of death, shall bring an action for the recovery of damages against such party other than the employer, the amount thereof, manner in which and the persons to whom the same are payable, shall be as provided for in part 2 of this act and not otherwise; provided that in no case shall such party be liable to any person other than the employe or his dependents for any damages growing out of or resulting from such injury or death.

If the employe or his dependents shall elect to receive compensation from the employer, then the latter shall be subrogated to the right of the employe or his dependents to recover against such other party, and may bring legal proceedings against such party and recover the aggregate amount of compensation payable by him to such employe, or his dependents hereunder, together with the costs and disbursements of such action and reasonable attorney's fees expended by him therein."

The first paragraph gives the employe or dependent the choice of proceeding against the third party or against the employer.

The second paragraph provides that, if the employe or his dependent proceeds against the third party, the amount of the recovery and the manner in which and the persons to whom it shall be paid shall be as provided in the compensation act; in other words, the award against the third party is like the award had it been against the employer.

The third paragraph provides that, if the employe or dependent elects to take compensation from the employer, then the employer shall be subrogated to the rights of the employe or dependent against the third party; in other words, the employer then gets an award against the third party like the employe or dependent would have gotten, and such award again is like that given against the employer.

The dependent, Mrs. Johnson, elected to receive compensation from the employer, the milk company. The milk company was then subrogated to her rights, had she chosen to proceed against the street railway company. It was entitled to get against the street railway company an award like Mrs. Johnson could have gotten had she chosen to proceed against it. In some respects the principle applied in *Wendlandt v. Sohre*, 37 Minn. 162, 33 N. W. 700, may be invoked here. There an action by the plaintiff, who stood in the position of a surety, to compel the defendant to pay the creditor was sustained. While the statute, G. S. 1913, § 7684, permitted this procedure, it was stated by the court to be familiar equity practice.

To recover from the street railway company, the milk company must show a ground of recovery resting in negligence, that is, there must be negligence of the street railway company causing the injury, and it must not appear that the young man killed was contributorily negligent. The intervention of an executor or administrator is unnecessary. The actual amount of damage suffered by the dependent, Mrs. Johnson, is not a subject of inquiry. The statute fixes the amount of recovery. The employer recovers the "amount of compensation payable by him to such employe or his dependents hereunder, together with the costs and disbursements of such action and reasonable attorney's fees expended by him therein." The parties when they became subject to the compensation act consented to this result.

The street railway company was not a party to the award against the milk company. We are not required at this time to consider what defenses it may have when reliance is had upon an award or a payment under the act. It may be noted that it has been held that an award or payment by agreement pursuant to the act is prima facie evidence of its rightfulness. *Grand Rapids Lumber Co. v. Blair*, 190 Mich. 518, 157 N. W. 29; *Thompson & Sons v. Northeastern Marine Engineering Co.* [1903] 1 K. B. 428. Nor are we now concerned with what might happen in the event that liability ceased before the expiration of the 300 weeks, or what might happen in the event of a change of the amount of the award in a particular case. Such situations afford no more difficulty than like situations when the award is against the employer alone. Various situations will bring their peculiar difficulties, but none with which the law will be unable to cope satisfactorily.

The employer is not required to wait until all payments due to the employe or the dependent have been made and then sue at law. Neither does the employer absolve himself from liability when his rights against the third party are fixed. He is liable as before to the employe or dependent until satisfaction.

It may be that the plaintiffs could proceed, whenever it paid an instalment, against the casualty company as an indemnitor, the judgment in the first action being *res judicata* on the question of the third party's liability in negligence, but the view we adopt is in harmony with the purpose and provisions of the act and is easily workable.

We hold that the plaintiffs were entitled to proceed against the street railway company and have a determination of their rights without waiting until they had paid the amounts awarded to the dependent.

Judgment reversed.

F. R. STOCKER REALTY COMPANY v. JAMES PORTER.¹

May 27, 1921.

No. 22,281.

Broker — construction of agreement.

A contract between a real estate broker and a purchaser of certain property, by which the matter of the broker's compensation "was left entirely" with the purchaser, *held* to entitle the broker to the reasonable value of his services, and not to vest in the purchaser the right to refuse payment of any compensation at all. *Butler v. Winona Mill Co.* 28 Minn. 205, distinguished.

Action in the district court for Hennepin county to recover a broker's commission of \$640. The case was tried before Fish, J., who at the close of the testimony denied plaintiffs' motion for a directed verdict, and a jury which returned a verdict for the amount demanded. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Jamison, Swan, Stinchfield & Mackall, for appellant.

Rieke & Hamrum, for respondents.

BROWN, C. J.

Action to recover a broker's commission in a real estate transaction in which plaintiffs had a verdict and defendant appealed from an order denying a new trial.

The record and assignments of error present the single question whether there was error in the instructions of the trial court to the jury.

Plaintiffs alleged in their complaint that, for the services claimed to have been rendered defendant in the purchase of a half section of land situated in Kandiyohi county, defendant agreed to pay them a commission of two dollars per acre, a total of \$640; they also alleged that the services rendered were reasonably worth and of the value of that amount. On the trial plaintiffs offered evidence of the express contract as to com-

¹Reported in 182 N. W. 993.

pensation, and also that the services rendered were of the reasonable value of \$640. The assignments of error present no question as to the rendition of the services, and the verdict to the effect that they were rendered must be taken as final. Defendant, as a witness, expressly denied the alleged agreement to pay two dollars per acre for plaintiffs' services, and expressly asserted that the matter of compensation was left wholly to him to determine. He testified that at the conclusion of the negotiations he stated to the representative of plaintiffs, Fred R. Stocker, "I will tell you what I will do. I will look into the matter, but whatever there is in it as far as you are concerned will have to rest entirely with myself."

He further testified that Stocker assented to that condition. Defendant purchased the land, but declined to pay plaintiffs anything for their services. This action followed. The court instructed the jury that, if they found the facts as claimed by plaintiffs, they should award them the amount fixed by the contract, if an express contract was made, or the reasonable value of the services if there was no express agreement. The court further instructed that even on defendant's theory of the agreement between the parties, namely, that the matter of plaintiffs' compensation was left entirely to him, plaintiffs would be entitled to the reasonable value of their services. Defendant excepted to that instruction and therein is presented the only question in the case.

We think and so hold that the view of the trial court on this feature of the case was entirely right. Defendant accepted the services of plaintiffs, of whatever character they may have been, with the reservation that whatever "there [was] in it" for them must be left to him to determine. The fair construction of his reservation will not justify the conclusion as a matter of law that defendant could, if he so elected, deny to plaintiffs any compensation at all, and the trial court was correct in holding that there was embodied therein the obligation to pay what the services were reasonably worth.

The case of *Butler v. Winona Mill Co.* 28 Minn. 205, 9 N. W. 697, 41 Am. Rep. 277, cited by defendant as supporting his contention, is distinguishable from that at bar. The contract there before the court was similar to this one, but no claim was there made that defendant could arbitrarily refuse any compensation whatever. In fact, defendant

in that case offered to pay what he deemed the reasonable value of the work and service there involved, and the court held that in doing so he was within the terms of the contract, and that the amount so offered was the limit of the right of plaintiff, though the court found that the services rendered were of greater value than the amount so tendered. The case is not in point.

The rule stated and applied in *Annabil v. Traverse Land Co.* 108 Minn. 37, 121 N. W. 233, is here applicable. The most that can be said of this transaction, from defendant's standpoint, is that the parties contemplated that there was "something in it" for plaintiffs, the amount whereof defendant reserved the right to fix and determine. If no compensation for plaintiff at all was in the mind of defendant at the time, naturally he would have so declared, rather than to defer the matter for later determination.

Order affirmed.

WINNIFRED MILES v. NATIONAL SURETY COMPANY
AND OTHERS.¹

May 27, 1921.

No. 22,324.

Surety liable for sale of liquor to intoxicated person.

1. A sale of intoxicating liquor by a saloonkeeper to an intoxicated person is an illegal act rendering him and the surety on his bond jointly and severally liable for such damages as proximately result therefrom.

Surety not released by failure to file claim against saloonkeeper's estate.

2. One entitled to maintain an action for damages so resulting does not release the surety on the bond by failing to file in the probate court a claim for such damages against the estate of a saloonkeeper who dies before the action is brought.

Right of action.

3. Section 3200, G. S. 1913, confers a right of action for injury to his

¹Reported in 182 N. W. 996.

or her means of support upon each child of a person whose death is proximately caused by the illegal sale of intoxicating liquor, whether the child is a minor or an adult.

Verdict in favor of daughter sustained by evidence.

4. The evidence would justify a jury in finding that plaintiff, an adult daughter living in the home maintained by her father, was injured in her means of support by her father's death.

Insufficient evidence to prove death from attack on intoxicated man.

5. The evidence does not show conclusively that the father met his death as the result of his wanton attack upon an intoxicated man.

Judgment may be corrected.

6. If the judgment against the widow and minor children of the deceased saloonkeeper was not proper, it may be corrected by application to the district court.

Action in the district court for St. Louis county by the daughter of James P. Miles, deceased, to recover \$2,000 for the death of her father. The case was tried before Hughes, J., who at the close of the testimony denied the motion of defendant National Surety Company for a directed verdict on the ground that plaintiff had not introduced facts sufficient to constitute a cause of action against the principal upon the bond and the surety, and a jury which returned a verdict for \$600. The motion of defendants for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Archer & Pickering and *J. C. McGilvery*, for appellants.

Giblin & Manthey, for respondent.

LEES, C.

The defendant National Surety Company was surety for Frank Steblaj, an Eveleth saloonkeeper, on the bond required by statute, G. S. 1913, §§ 3116, 3117. On October 12, 1917, a man named John Shalka was in the Steblaj saloon. He was intoxicated, but nevertheless Steblaj continued to furnish him with liquor. There was evidence that he threatened to attack a man in the saloon and only desisted at the command of Steblaj, and that thereafter he was supplied with more liquor. At this juncture plaintiff's father, James P. Miles, entered the saloon and in a

few minutes there was a verbal altercation between him and Shalka, followed by blows. The evidence tends to show that Miles was the aggressor, and that he pulled off his coat and struck Shalka several times before the latter retaliated by picking up a beer mug with which he struck Miles on the side of the head. The mug was shattered by the force of the blow and a splinter of the glass pierced an artery in Miles' neck, and, as a result, he bled to death. He left surviving a widow and two daughters. He was a laboring man earning about \$90 a month. Both daughters were of age and were employed in Eveleth. They each earned about \$40 a month at the time of their father's death. They brought their earnings home and gave them to their mother. Miles also gave his earnings to her and she paid the family bills. After Miles' death plaintiff brought an action against Steblaj and the surety on his bond to recover damages under the provisions of section 3200, G. S. 1913, which action was dismissed before it came to trial. Later on Steblaj died and administration upon his estate was had in the probate court of St. Louis county. Notice to creditors was given. Plaintiff filed no claim against the estate. The estate was solvent and has been closed in the probate court. Unexempt property of the value of about \$1,200 was turned over to the widow and children. Then the present action was brought under the same statute. The surety company was the only defendant originally named. On its application the court made an order joining Steblaj's widow and children as defendants. The surety company and the widow and children appeared by different attorneys and answered separately. The case was tried by a jury. The surety company moved for a directed verdict in its favor. The motion was denied. The jury returned a verdict against all of the defendants and in favor of plaintiff for \$600. Defendants moved for judgment notwithstanding the verdict. The motion was denied, judgment was entered, and the defendants jointly and severally appealed therefrom.

The assignments of error are: (1) That, by failing to file in the probate court a claim against the Steblaj estate, plaintiff lost her right to hold the defendant as surety on the bond; (2) that the evidence conclusively showed that plaintiff supported herself without aid from her father; (3) that the father was killed in a drunken brawl which he

himself provoked, and that his own acts were the proximate cause of his death.

1. One of the conditions of the bond was that Steblaj should not sell intoxicating liquors "to any person to whom such sale is forbidden." Section 3148, G. S. 1913, forbids a sale to an intoxicated person. Shalka was such a person and Steblaj violated the law and the conditions of his bond when he sold liquor to him. Defendant, as surety on the bond, was liable for damages proximately resulting from the illegal act. *Fest v. Olson*, 138 Minn. 31, 163 N. W. 798. The language of the statute is: "The surety, or sureties, on any such bond shall be liable for any damage or injury caused by or resulting from the violation of any of the conditions thereof in any and all cases where the principal upon such bond may be liable." Section 3117, G. S. 1913.

In *Lynch v. Brennan*, 131 Minn. 136, 154 N. W. 795, the history of the legislation on this subject is given, and the conclusion reached that both the principal and the surety on the bond are liable for any damage proximately caused by any act which is a violation of any of the conditions of the bond. In *Posch v. Lion B. & S. Co.* 137 Minn. 169, 163 N. W. 131, the court remarked: "Of course the surety is not liable unless the principal is. If the liability is joint and several, it is plain that the surety may be sued alone. This is probably the nature of the liability."

In *Koski v. Pakkala*, 121 Minn. 450, 141 N. W. 793, 47 L.R.A.(N.S.) 183, it was held that in case of the death of the principal, one having a cause of action under section 3200, G. S. 1913, might prosecute it against the representative of the estate of the deceased. Under these decisions and the provisions of the statute quoted, plaintiff's failure to file a claim for damages against Steblaj's estate did not release the surety on the bond. The doctrine of *Siebert v. Quesnel*, 65 Minn. 107, 67 N. W. 803, if it is still to be adhered to in spite of what was said about it in *Board of Co. Commrs. of St. Louis County v. Security Bank of Duluth*, 75 Minn. 174, 77 N. W. 815, has no application to the case at bar. The statute imposes direct liability upon the surety. We see no reason why the intimation in the *Posch* case should not be accepted as a correct statement of the law, and accordingly hold that a surety on

such a bond as we have before us may be held jointly and severally liable with the principal.

2. The evidence was sufficient to justify the jury in finding that plaintiff was injured in her means of support by the death of her father. To a considerable extent his earnings supplied the family table and maintained the home which sheltered her. The fact that she was of age does not deprive her of her right of action. Section 3200, G. S. 1913, confers such right on every child, whether a minor or an adult, who can establish injury to his or her means of support. A father may voluntarily support his daughter though she is of age. It is not uncommon for him to do so. If he does, he is her means of support, of which she is deprived by his death. For these reasons we do not concur in the contention that there can be no recovery in the absence of the father's absolute present legal duty to support a daughter who brings an action under the provisions of section 3200.

3. Defendant argues at considerable length that Miles was the aggressor in the affray which resulted in his death. Much of the testimony is to that effect, but there is positive testimony by one witness that, after the first clash with Shalka was over, Miles put on his coat and stepped up to the bar and that Shalka came up, drank part of a glass of beer and then swung around and struck Miles with the glass. If the jury believed this testimony, they might infer that Shalka was not defending himself when he struck the fatal blow, and that he struck it solely to revenge the indignity and ill usage he had suffered at Miles' hands. We are satisfied that it was not conclusively proved that Miles met death while making a wanton assault on Shalka. It is, therefore, unnecessary to decide whether there could be a recovery if Shalka unintentionally killed Miles while defending himself against a wanton attack. Defendants requested and the court refused to instruct the jury that, if Shalka acted in self-defense in doing what he did, their verdict should be in defendants' favor. We are not called upon to decide whether this was error, for the reason that it is not covered by the assignments of error or discussed in the briefs.

4. Judgment was entered against the surety company and Steblaj's widow and children. Examination of the return to this court shows that the widow was appointed guardian of the children, all of whom are

minors, and that they have been enjoined, during the pendency of the action, from disposing of the property they inherited from Steblaj. They joined in making this appeal, but no brief was filed in their behalf, and they do not appear to be here questioning the judgment against them. We need not decide whether the judgment against them is a proper one or determine their rights and those of the surety company as between one another. If the judgment as to the widow and children is not proper, it is within the power of the court below to correct it. The surety company neither does nor can complain about it.

Judgment affirmed.

CORA R. EBERHART v. WALTER W. EBERHART.¹

June 3, 1921.

No. 22,024.

Divorce — cruel and inhuman treatment — finding supported.

1. The evidence in this case is sufficient to sustain the court's finding for defendant on the issue of alleged cruel and inhuman treatment.

Custody of child.

2. In determining the question of custody of a child, the best interest of the child is the primary consideration. Divided custody is not desirable. A son of the parties, five years old, under the circumstances of this case, should be given into the custody of the plaintiff, his mother, with liberal opportunity to defendant, his father, to visit and associate with him.

Allowance of fees and suit money.

3. This court may make an allowance for counsel fees and suit money in connection with an appeal in a divorce case, and, where an application is made during the pendency of the appeal, it may be continued to be determined on decision of the case.

Action in the district court for Blue Earth county for divorce, custody of child and alimony. The case was tried before Comstock, J., who made findings refusing the divorce and granting the custody of the

¹Reported in 183 N. W. 140.

child as stated in the first paragraph of the opinion. Plaintiff's motion for amended findings was granted in part and her motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Modified.

C. J. Laurisch and S. B. Wilson, for appellant.

H. L. & J. W. Schmitt & H. W. Volk and Moonan & Moonan, for respondent.

HALLAM, J.

Plaintiff and defendant were married in August, 1915. A son was born to them in May, 1916. In September, 1918, plaintiff commenced this action for divorce alleging cruel and inhuman treatment. The trial court denied plaintiff a divorce, and decreed that, during the continuance of the estrangement, plaintiff should have the custody of the child from November 1 until May 1 following, each year, and that defendant should have his custody from May 1 to November 1.

1. The testimony was much in conflict. The testimony on behalf of plaintiff was sufficient to make out a case. But the essential acts of cruelty were denied by defendant. The evidence presented a plain issue of fact. On this evidence the trial court found that there was no proof of bodily harm inflicted or threatened; that the evidence was not sufficiently strong to constitute proof of ill treatment injurious to plaintiff's health, nor such as to constitute cruel and inhuman treatment; and that on the whole record plaintiff has failed to establish, by a fair preponderance of the evidence, the allegations of cruelty alleged in the complaint. No good purpose would be served by rehearsing the conflicting evidence of the parties and their witnesses. After a very careful review of it, we are of the opinion that there is sufficient evidence to sustain the finding of the court.

Counsel for defendant take exception to a statement in the findings that the evidence is not sufficient to constitute cruel and inhuman treatment "within the meaning and intent of the approved rules of this jurisdiction." We take this to mean the "jurisdiction" of the state of Minnesota, and not, as counsel understand it, of the judicial district in which the case was tried.

2. Plaintiff takes exception to the portion of the decision relating to

the custody of the child. It was proper for the court to determine the custody of the child during such time as the estrangement between the parties shall continue. In determining this question the best interest of the child is the primary consideration. The matter is one not free from difficulty. As we read the record we are impressed with the belief that both these parties are good parents. The unfortunate difficulty is that they have not found the way of getting along well together. Each would undoubtedly care for the child as well as the peculiar circumstances of the case permit. Neither one can give the child just the home life that he is entitled to enjoy.

We are of the opinion that the interest of the child will not be best served by the divided custody ordered by the trial court and that custody should be awarded to one or the other parent. If he cannot have the daily care and guidance of both father and mother, we are of the opinion that, to a boy five years old, the mother's care is most indispensable. Yet the father should be afforded most liberal opportunity of seeing and visiting his child and of taking him out at all reasonable times. The judgment of the trial court will be modified so as to award the custody of the child to plaintiff, under such regulations for visiting and association on the part of the father, and with such allowance for support, as the trial court may order.

3. Prior to the argument of the case in this court, plaintiff made application for an allowance of counsel fees and suit money in connection with the appeal. The matter was continued to be determined at the time of determination of the appeal. This court has power to make such an allowance. *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766; *Spratt v. Spratt*, 140 Minn. 510, 166 N. W. 769, 167 N. W. 735. If such an allowance is seasonably applied for during the pendency of the appeal, the application may be continued to be determined on decision of the case. *Baier v. Baier*, 91 Minn. 165, 97 N. W. 671. We are of the opinion that the appeal was taken in good faith and that an allowance should be made to plaintiff as follows: For suit money, the actual expenditures made, namely, \$348.75, and for attorney's fees, the sum of \$375, the same to be paid by the defendant, and the defendant is ordered to make payment accordingly.

Judgment modified.

STATE v. WILLIAM J. ABDO.¹

June 3, 1921.

No. 22,167.

Homicide — defendant entitled to submission of manslaughter in second degree.

1. If the facts proved under an indictment for murder in the first degree warrant a conviction of manslaughter in the second degree, the defendant upon request is entitled to the submission of such degree of manslaughter

Same — theory of charge to which defendant was entitled.

2. The defendant was convicted of manslaughter in the first degree under the statute defining manslaughter in the first degree as an unjustifiable killing committed "in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon," upon the theory that in the heat of passion he intentionally knocked or threw the deceased over a stairway banister in an apartment house to the landing 28 feet below, whereby he was killed, though he did not intend killing him. The evidence was such as to justify a finding that the defendant in the heat of passion struck the deceased with his fist and knocked or pushed him against the banister, but with no intention of putting him over, or of doing more than strike him or push him against the banister, or of doing him harm at all other than such as would naturally result from striking or pushing him. It is held that the defendant was entitled to an instruction submitting manslaughter in the second degree defined by the statute as an unjustifiable killing "in the heat of passion, but not by a deadly weapon or by use of means either cruel or unusual."

Defendant was indicted by the grand jury of Hennepin county charged with the crime of murder in the first degree, tried in the district court for that county before Bardwell, J., and a jury, and found guilty of manslaughter in the first degree. From an order denying his motion for a new trial, defendant appealed. Reversed.

¹Reported in 183 N. W. 143.

A. M. Cary, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General and *Floyd B. Olson*, County Attorney, for respondent.

DIBELL, J.

The defendant was indicted for murder in the first degree for the killing of one Jack Regan on August 23, 1919. He was convicted of manslaughter in the first degree and appeals.

The defendant requested the court to submit manslaughter in the second degree. The court refused. The question is whether in refusing it erred.

1. Under the indictment the defendant could be convicted of manslaughter in the second degree if the facts warranted, and if they were of such character he was entitled, upon request, to an appropriate instruction submitting the second degree. *G. S. 1913, §§ 8476, 9213; State v. Smith, 56 Minn. 78, 57 N. W. 325; State v. Gaularpp, 144 Minn. 86, 174 N. W. 445; State v. Brinkman, 145 Minn. 18, 175 N. W. 1006; State v. Morris, supra, p. 41, 182 N. W. 721.* And it was early held that if the jury has a reasonable doubt whether the accused is guilty of the higher or lower degree it should convict of the lower. *State v. Laliyer, 4 Minn. 277 (368).*

2. The defendant Abdo, Regan who was killed, and one Rennes were ex-service men. They were crippled to some extent and were taking vocational training at the Dunwoody Institute in Minneapolis. They were all good friends. Regan and Rennes were pals. On the night of August 23, 1919, they were shooting dice in the defendant's room on the third floor of an apartment building in Minneapolis. Apparently they had been drinking. The defendant had something like \$80 when they commenced gambling and lost all but about \$16. It is probable that Regan got most of it. The defendant claimed that the dice were loaded. He insisted that unless his money was returned he would break the dice and ascertain the fact. A quarrel and fight quickly followed. The defendant was pitted against Regan and Rennes. In some way Regan went over the bannister to the landing 28 feet below and was killed. No one of the three was armed.

The court, in addition to murder in the first degree and in the second

degree, submitted manslaughter in the first degree defined by the statute as an unjustifiable homicide committed "in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon." G. S. 1913, § 8608, subd. 2. The defendant asked that the court submit manslaughter in the second degree defined by the statute as an unjustifiable homicide committed "in the heat of passion, but not by a deadly weapon or by use of means either cruel or unusual." G. S. 1913, § 8612, subd. 2. The court refused.

The evidence was such as to justify a finding that Regan and Rennes were the aggressors and that the defendant did nothing more than reasonably repel their attacks, and in doing so pushed or threw Regan against or over the banister; or that he fell over the banister not as an immediate effect of the defendant's blow. Such a finding would relieve the defendant of criminal responsibility and a verdict of not guilty would necessarily result.

The evidence was such as to justify a finding that in the heat of passion engendered in the quarrel the defendant wrongfully and not in his own protection or in repelling an attack, intentionally and knowing the situation threw Regan over the banister to the landing. Such a finding would result in a verdict of manslaughter in the first degree. That a killing by purposely throwing one from the landing on the third floor to the landing on the first floor, a distance of 28 feet, though without an intent to kill, would be a killing in a "cruel and unusual manner," an inherent element of manslaughter in the first degree, seems clear enough. What constitutes cruel or unusual manner or means within the meaning of the statute is suggested by the supreme court of Kansas, in considering second degree manslaughter which corresponds to our first degree, as follows: "It must be said, therefore, that in order to constitute manslaughter in the second degree there must be some refinement or excess of cruelty sufficiently marked to approach barbarity, and to make it especially shocking; and the unusual character of the manner displayed must stand out sufficiently peculiar and unique to create surprise and astonishment, and to be capable of discrimination as rare and strange." *State v. Knoll*, 72 Kan. 237, 83 Pac. 622. And see *State v. Wilson*, 98 Mo. 440, 11 S. W. 985; *Schlect v. State*, 75 Wis. 486, 44 N. W. 509.

The jury was not required to accept either of the two explanations given of what happened. It could conclude that in the fight the defendant was in the wrong; that he knocked or pushed or threw Regan against the banister with no purpose of throwing him over it; that he had no intention of doing harm other than such as would result from a blow with the fist; that he then turned to repel the attack of Rennes; and that Regan as a result of the defendant's blow stumbled or fell or in some way went over the banister to the landing below and was killed. There is considerable in the evidence to suggest that neither the defendant nor Rennes knew that Regan had been hurt at the landing until after they were through with their fight and after Rennes had restored a few dollars of the evening's gains. If this state of facts were found the defendant might be guilty of manslaughter in the second degree, but not in the first degree, for the killing, while in the heat of passion, would not be "in a cruel and unusual manner," or by "means either cruel or unusual." It would be an unintentional but wrongful killing, with no greater criminal consequences than if death had resulted directly from a blow given in the fight. If a blow criminally given and in the heat of passion unintentionally results in death, the act which otherwise is an assault becomes manslaughter. But as between the two degrees of manslaughter culpability is measured by the means and manner which the wrongdoer chooses to use. The situation involved is peculiar and no case directly in point is cited, but *Bliss v. State*, 117 Wis. 596, 94 N. W. 325, involves a quite similar principle.

It was error not to submit manslaughter in the second degree.

In view of a new trial it may be suggested with propriety that the evidence fails to show by the degree of proof required either murder in the first or in the second degree.

Order reversed.

PAPER, CALMENSON & COMPANY v. R. SIGELMAN, DOING
BUSINESS AS R. SIGELMAN HIDE & FUR COMPANY.¹

June 3, 1921.

No. 22,212.

Vacation of judgment denied.

The trial court did not abuse its discretion in denying defendant's application to vacate the judgment and permit him to answer.

Action in the district court for Ramsey county to recover \$422.28. From an order, Hanft, J., denying his motion to vacate the judgment and for leave to answer, defendant appealed. Affirmed.

Leonard Eriksson, for appellant.

Jesse B. Calmenson, for respondent.

DIBELL, J.

The defendant appeals from an order denying his motion to vacate a judgment and for leave to answer.

The defendant lived and did business at Fergus Falls and the plaintiff had its place of business at St. Paul. They had commercial dealings with one another. On July 6, 1920, the plaintiff wrote to the defendant demanding payment of two claims and threatening suit. The defendant paid no attention. On August 14, 1920, suit was commenced and garnishment proceedings were instituted. The summons and complaint and a copy of the garnishee summons and notice were personally served upon the defendant on August 21. On October 22 judgment was entered. On November 1 the defendant made its application for relief, which was denied on the thirteenth. The papers on which the motion to vacate the judgment was based were filed and were before the court, but the defendant did not appear at the hearing. The matter was determined in his absence. He made no further application for relief. His answer was a general denial coupled with an allegation that the R.

¹Reported in 183 N. W. 136.

Sigelman Hide & Fur Company was a corporation and not a trade name under which he did business. Affidavits were interposed in behalf of both the plaintiff and the defendant as to the validity of the cause of action and of the defendant's defense. The defense pleaded is good enough. The excuse offered for not responding to the summons is not very satisfactory. Substantially it is the defendant's ignorance of court proceedings and business usages. The evidence justifies the view that he was familiar enough with both.

Whether the judgment should have been vacated and the defendant allowed to answer was a matter resting within the discretion of the trial court. There was no abuse of discretion. This court would not interfere with the trial court's determination either way.

Order affirmed.

O. D. SELL v. HENRY LENZ.¹

June 3, 1921.

No. 22,234.

Sale — construction of phrase, "invoice price."

A written memorandum of contract for the sale of a stock of merchandise, construed in connection with the oral negotiations between the parties leading up to the sale and their acts and conduct in completing the transaction after the memorandum was prepared and signed, *held* to make the retail or inventory price of the goods and not the wholesale or invoice price the basis for the computation of the purchase price.

Action in the district court for Carver county to recover \$1,036.83, balance due on the price of merchandise. The facts are stated in the opinion. The case was tried before Tift, J., who at the close of the testimony granted plaintiff's motion for a directed verdict. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

¹Reported in 183 N. W. 135.

Francis Muekel, for appellant.

W. C. & W. F. Odell, for respondent.

BROWN, C. J.

Action to recover a balance claimed to be due plaintiff on the purchase price of a stock of goods sold to defendant. At the conclusion of the trial the court directed a verdict for plaintiff for the amount claimed, and defendant appealed from an order denying a new trial.

It appears that the plaintiff owned and conducted a general mercantile business at Mayer, a small village in Carver county. Defendant owned and operated at the same place a barber shop with attached confectionery department. Defendant sought to extend his business, and proposed to buy the mercantile business of plaintiff. He approached plaintiff on the subject, and after some discussion offered to buy his stock and to pay therefor 95 per cent of the inventory price. The offer was not at first accepted by plaintiff, and was again renewed, as testified to by defendant, in the following language: "I repeated the deal over again, I told him, now I says, let it be understood that we will pay you 95 cents on the dollar inventory prices, and you furnish the invoice." Plaintiff finally accepted the offer, and the parties later reduced the agreement to the following brief writing, namely: "I, Otto D. Sell, party of the first part, do agree to sell my stock of merchandise to Henry Lenz, party of the second part, for 95c on the dollar invoice price."

The parties thereafter joined in taking an inventory of the stock, entering in stock books kept by each as the work progressed the various items of goods, together with the selling prices as appeared from tags attached to the different articles. The total value of the goods thus shown was over \$4,000. On the completion of the inventory defendant made a payment of \$2,000; a week later a further payment of \$1,200, leaving a balance due of the sum of \$1,036.83. This he subsequently refused to pay, and this action followed.

The sole defense interposed on the trial was that the invoice or cost price to plaintiff as the goods were billed to him by the wholesale houses was by the written memorandum of sale made the basis for the ascertainment of the amount to be paid by defendant, and not the local or retail

prices at which plaintiff had marked and sold the goods. This was controverted by plaintiff.

The trial court ruled, after hearing all the evidence, that the parties in closing the transaction intended to make the retail or inventory prices the basis for ascertaining the purchase price, and that 95 cents on the dollar of the total invoice, after deducting payments, left as a balance the amount claimed in the complaint, for which a verdict was directed for plaintiff. We concur in that view of the case.

The intention of the parties must control the question, not the technical legal meaning of the term "invoice price" as used in the memorandum of sale. The evidence taken as a whole, together with the acts and conduct of the parties, the language employed in the preliminary negotiations, their act in taking the inventory of the goods and recording therein the retail prices, without any claim or suggestion that the wholesale prices should be ascertained, lead quite conclusively to the view that the wholesale or invoice prices were not in the mind of the parties at all in closing the sale. The inventory taken and recorded in the books in the manner stated was joined in by plaintiff and defendant and their wives, aided by two representatives of wholesale concerns who participated, as the evidence tends to show, at the instance of defendant. No suggestion or claim was made during the taking of the inventory that wholesale prices of the articles should be produced, and the retail or selling price was alone taken into account; all present acted on that as the theory and intent of the contract. At the conclusion of the work defendant expressed satisfaction, made a payment of \$2,000 on the purchase price, and an additional payment a week or so later of the sum of \$1,200, then promising to pay the balance in a few days. He subsequently discovered in the inventory taken some errors as to values there recorded, not of importance here, and consulted a lawyer, who evidently advised him that the expression "invoice price," as used in the memorandum of sale, meant the wholesale cost of the goods, within the legal definition of the term. The advice of counsel, from the viewpoint of the written memorandum standing alone, was correct. But it is clear, from the facts stated, of which counsel was not advised, that the parties in entering and completing the transaction did not have that rule in mind, and proceeded on the theory that the sale was on the basis

of 95 cents on the dollar of retail prices; they so inventoried the stock. There was nothing to submit to the jury.

Order affirmed.

IN THE MATTER OF THE CONDEMNATION BY STATE FIRE
MARSHAL OF BUILDING OWNED BY ANNA FITZPATRICK.
STATE FIRE MARSHAL v. ANNA FITZPATRICK.¹

June 3, 1921.

No. 22,249.

Finding that building was liable to fire sustained.

1. The findings taken together demonstrate that the building condemned in its present condition is especially liable to fire and is so situated as to endanger life and limb and other property.

Order for destruction unreasonable.

2. But the evidence does not support the finding that the building is beyond repair. On the contrary, it appears that by proper repair and alteration it will be as free from danger as any wooden building can be made. In that situation it was unreasonable and arbitrary to order the destruction without giving the owner the option to alter and repair.

In the above entitled matter Anna Fitzpatrick, owner, filed objections. The matter was tried in the district court for St. Louis county before Nelson, J., who made findings and affirmed the order of condemnation of the state fire marshal. The owner's motion for a new trial was denied. From that order and from an order denying her motion for a new trial, she appealed. Reversed.

John B. Richards, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *Albin E. Bjorklund*, Special Assistant Attorney General, for respondent.

¹Reported in 183 N. W. 141.

HOLT, J.

The state fire marshal upon inspection determined that a vacant three-story frame building, known as 226 Lake avenue South, in Duluth, Minnesota, was especially liable to fire and dangerous to other property and to human life and limb, and ordered defendant, the owner, to demolish and remove it within 30 days. Defendant filed objections in due time, and a hearing was had in the district court where the order of the fire marshal was sustained. This appeal is from the order of the district court refusing a new trial.

The proceeding is under chapter 469, p. 803, Laws 1917 (amending chapter 36, G. S. 1913, §§ 5140-5146), which provides as follows: "The state fire marshal may condemn and by order direct the destruction, repair, or alteration of any building or structure which by reason of age, dilapidated condition, defective chimneys, defective electric wiring, gas connection, heating apparatus or other defect, is especially liable to fire and which building or structure, in the judgment of said state fire marshal, is so situated as to endanger life or limb or other buildings or property in the vicinity."

The main contentions are: (1) That there is no finding that the building is especially liable to fire; and (2) that the finding that it is beyond reasonable repair is contrary to the evidence.

The findings may be subject to the criticism that the evidentiary facts, instead of the ultimate fact, are found. But we think the evidentiary facts, taken together, form the ultimate fact, or unavoidable conclusion, that the building in its present condition of disrepair and vacancy is especially liable to fire and so situated as to endanger other property. It was built about 30 years ago, is of pine, and stands on cedar posts or piles without stone or cement foundation. The court finds: "That by reason of age and failure to repair, the building is now in a dilapidated condition; that the shingles are loose and curled; that the siding is decayed and has in many places fallen off, leaving large openings in the walls; that the inside sheathing is loose and rotten; that the building has settled, causing the same to lean toward the north more than sixteen inches, and is liable to collapse; that the sills and supporting timbers are thoroughly decayed, and that the plaster has fallen from the walls and ceilings in many places, exposing the laths; that the

floors are bulged, weak, and bent; that the building is beyond reasonable repair, and is liable to fire, and is dangerous to other buildings and property in said vicinity and to human life and limb." If all the above findings are supported the building was a special fire hazard, and should be removed unless the danger can be eliminated.

But we think the finding that the building is beyond reasonable repair is contrary to the evidence. By reputable builders, defendant proved that by an expenditure of less than \$4,000 the building will be as safe and free from fire hazard as any wooden structure can be made, and will be as good, strong and secure as when first built; that to reproduce this building now would cost between \$18,000 and \$19,000; that the estimated value of the building as it now stands is from \$5,000 to \$10,000. There was no evidence to the contrary. Defendant is ready and willing to make repairs and alterations. The fire marshal has authority to prescribe what they shall be. This building is within the fire limits, but no ordinance or building regulation forbids repairs or alterations thereon. Under these circumstances the order requiring the destruction of the building, without giving defendant an option to eliminate the special fire hazard and danger now existing by proper alterations and repairs, would seem to be unreasonable, and to needlessly deprive the owner of property of large value.

The law in question is drastic. It authorizes the destruction of property without compensation. The state, in the exercise of its police power, may do this, but the necessity for thus sacrificing private property must clearly appear. The law itself holds out an alternative by which the owner may be directed to alter or repair so as to eliminate danger. When the police power of the state is exerted against property it is ordinarily to regulate its use, not to destroy it. Destroying or depriving the owner thereof is a last resort, unless the property is of such nature that its use or possession cannot be other than for evil. It was said in *York v. Hargadine*, 142 Minn. 219, 171 N. W. 773, 3 A. L. R. 1627, that the fire marshal and the courts should exercise the power conferred by the law in question with great caution. "Where repairs or alterations can be made lawfully upon a wooden building so as to eliminate the special dangers arising from its location and condition to surrounding property and to persons, such repairs or alterations should be ordered

rather than a tearing down of the building." The police power cannot be extended by the authority which is intrusted with its exercise to an arbitrary misuse of private rights. *Northwestern Tel. Exch. Co. v. City of Minneapolis*, 81 Minn. 140, 83 N. W. 527, 86 N. W. 69, 53 L.R.A. 175.

The question then is reduced to this: The building being capable of repair and alteration so as to eliminate the hazard it gives rise to, equal to or below that which exists in any well maintained wooden structure similarly located, was the action requiring its destruction unreasonable and arbitrary? We are of the opinion that the record indicates that the fire marshal and the court did not give due weight to the possibility of changing the situation by proper repairs and alterations. To order the destruction of the building under this evidence seems arbitrary and unreasonable. Defendant should have the option either of repairing and altering the building so as to conform to the reasonable demands of the fire marshal, or else demolishing it.

It is, perhaps, not out of place to remark that we could not properly give any consideration to the fact that a frame building of about the same appearance as defendant's and within two feet thereof is not sought to be destroyed, nor to the fact that on the other side of defendant's building the owners of frame structures have consented to judgments condemning them.

The order is reversed and the court below is directed to annul the order of the fire marshal who will proceed in the matter in conformity to the principle herein expressed.

JOSEPH KUNDA, BY HIS FATHER, CARL KUNDA v.
BRIARCOMBE FARM COMPANY.¹

June 3, 1921.

No. 22,260.

Master and servant — proximate cause of injury to minor employe.

A master delivered to his servant, a minor under the age of 13 years, a shot gun and ordered and directed him to go out and therewith shoot

¹Reported in 183 N. W. 134.

and scare the birds from the master's corn fields, thus to save the crop from destruction. The servant complied with the order, and while in the performance thereof the gun, in some accidental way, was discharged, seriously injuring the servant's foot. In an action by the servant for the injury it is *held*:

(1) That the question of the proximate cause of the injury, if not one of law arising from the facts stated, was one of fact for the jury.

(2) If the act of the master was the proximate cause of the injury, the fact that, in accepting the gun and taking it into his possession for the purpose stated, the servant technically violated the provisions of G. S. 1913, § 8804, will not defeat his right of action for the wrong of the master. *Welker v. Anheuser Busch Brewing Assn.* 103 Minn. 189, and similar cases distinguished.

(3) The technical violation of the statute by the servant was a mere incident and not the moving cause leading to the injury.

Action in the district court for Winona county by the father of Carl Kunda to recover \$18,000 for injuries to his minor son. The case was tried before Callaghan, J., who at the close of the testimony denied defendant's motion for a directed verdict, and directed a verdict in favor of plaintiff, leaving to the jury the question of damages only, which returned a verdict for \$5,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, provided plaintiff consented to a reduction of the verdict to \$3,500, defendant appealed. *Affirmed.*

Brown, Abbott & Somsen, for appellant.

Barton & Kinkead, for respondent.

BROWN, C. J.

Defendant, a Minnesota corporation, owns and, through a general manager, operates a large farm in Winona county. Plaintiff, Joseph Kunda, at the time involved in the action was under 13 years of age by a few days. He was employed by defendant to work on the farm, and to do and perform such work and chores as boys of his age usually do in such employment. He had been so employed for short periods during the preceding year or two. With the implied approval and delight of the neighborhood blackbirds, defendant raises large fields of corn annually, to which the birds pay due attention and flock in large num-

bers at to them the appropriate corn season. They were very destructive and it became necessary by some method to drive them away. To accomplish this defendant's manager adopted the practice of frightening them off by means of the shotgun. Platforms about 14 feet high were constructed at different points in the field, upon which some employe would go with a gun and shoot into or at the flocks of birds, thus frightening them off, at least for the time being keeping them in motion, interrupting their work in destruction of the corn. On August 6, 1919, plaintiff was given by defendant's manager a single barrel shot gun, with ammunition in the form of shells, and directed to go to the corn field, and upon the platforms therein and shoot the birds and scare them away. In climbing one of the platforms the gun in some accidental way was discharged, inflicting a serious injury to one of his feet, from which he is still suffering.

This action was thereafter brought in his behalf to recover damages for the injury, charging in the complaint by suitable allegations that, by reason of the youth of plaintiff, it was an act of negligence on the part of defendant in requiring him to perform the particular service. Defendant by answer put in issue the charge of negligence, and affirmatively alleged that plaintiff was in possession of the gun in violation of law, and negligently and carelessly caused it to be discharged, and was thus injured and not otherwise.

At the conclusion of the trial defendant requested an instructed verdict in its favor, on the ground that plaintiff, at the time of his injury, was acting in violation of the provisions of G. S. 1913, § 8804, and that such violation was the sole and proximate cause of his injury, thus precluding his right of action against defendant. The request was refused; the court instructed the jury that, on the facts presented, plaintiff was entitled to recover, and submitted to them the question of damages only. The jury returned a verdict for plaintiff accordingly, and defendant appealed from an order denying its motion for judgment or a new trial.

The statute claimed to have been violated by plaintiff (section 8804 supra), provides that: "No minor under the age of fourteen years shall handle, or have in his possession or under his control, except while accompanied by or under the immediate charge of his parent or

guardian, any firearm of any kind for hunting or target practice or any other purpose. Every person violating any of the foregoing provisions, or aiding or knowingly permitting any such minor to violate the same, shall be guilty of a misdemeanor."

In this court defendant presents no claim that a new trial should have been granted by the trial court, either for errors committed on the trial, or for the insufficiency of the evidence to support plaintiff's cause of action, if his right to recover at all be conceded. Its sole contention is that plaintiff was in violation of the statute in going out with the gun to shoot the birds, and since, in proving his case against defendant, he necessarily must disclose his own culpability in the transaction, under the rule of such cases as *Welker v. Anheuser-Busch Brewing Assn.* 103 Minn. 189, 114 N. W. 745, and *Kelly v. Theo. Hamm Brewing Co.* 140 Minn. 371, 168 N. W. 131, he cannot recover.

In our view of the facts, which are not in dispute, defendant's claim of immunity from legal responsibility is not well founded. The case is controlled in this respect by the rule of proximate cause, and the *Welker* and *Kelly* cases, *supra*, are not in point. Plaintiff was the servant of defendant, youthful and not of mature judgment or discretion, and subject in his employment to the orders and directions of defendant, his master. His possession of the gun was not his voluntary act, nor for purposes of his own, but in compliance with directions of defendant and in furtherance of his interests. But for the act of defendant in delivering the gun to him, he would not have had possession thereof at all, and that act of defendant, coupled with directions to go forth and shoot the birds, was not only a violation by defendant of the statute quoted, but an act which, on the evidence here presented, probably would have justified the jury in finding negligence independent of the statute. *Clark v. Goche*, 148 Minn. 360, 182 N. W. 436. At any rate it was the original act leading, without interruption by any other independent cause, to the accident and injury and therefore the proximate cause thereof. 22 R. C. L. 117. If this conclusion does not follow as a matter of law from the facts of the case (*Anderson v. Settergren*, 100 Minn. 294, 111 N. W. 279), the question of proximate cause was at least one for the jury. 2 *Dunnell*, Minn. Dig. § 6976. And, though plaintiff was in technical violation of the statute in accepting the gun from defendant, that act on his

part was a mere incident in the transaction, and not necessarily the initiatory cause of the result which followed. The principle applied in *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542, L.R.A. 1915D, 628, is pertinent.

Order affirmed.

HANS J. BORSHEIM v. GREAT NORTHERN RAILWAY
COMPANY.¹

June 3, 1921.

Nos. 22,267, 22,268.

Fire from locomotive.

1. The evidence sustains a finding that a fire communicated by a locomotive engine of the defendant railroad company mingled with other fires and came to the plaintiff's property and destroyed it, and that the railroad fire was a material element in its destruction and therefore the railroad or the director general was responsible for the damage done.

No defect of parties.

2. Upon the record it is held that there was not a defect of parties plaintiff because of a failure to join an insurance company which paid a fire loss upon the plaintiff's property.

Substitution of defendant.

3. It was not error to refuse to substitute the agent of the President in place of the defendant railway company and to deny the railway company's motion to dismiss. [Vacated after reargument. See 5 below.]

Government liable for fire loss during Federal control.

4. The government is liable for a loss occurring by reason of a fire communicated by a locomotive engine of a railway company during Federal control under the statute imposing upon railroads a liability for damages done by a fire so communicated.

AFTER REARGUMENT.

June 29, 1921.

President's agent should have been substituted as defendant.

5. Following *Missouri Pac. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, and overruling so far as inconsistent *Lavalle v. Northern Pac. Ry. Co.* 143 Minn. 74, and other cases cited in paragraph 3, the former

¹Reported in 183 N. W. 519.

decision holding, as stated in paragraph 3, that it was not error to refuse to substitute the agent of the President for the railroad company and to dismiss the company is vacated, and it is *held* that the agent of the President should have been substituted for the railroad company and the company dismissed from the action.

Action in the district court for St. Louis county to recover \$7,080 for destruction of property caused by fire from defendant company's locomotive. The case was tried before Fesler, J., who at the close of the testimony denied defendants' separate motions to dismiss the action on the grounds that plaintiff had failed to establish a cause of action against either defendant, that there was a defect in parties plaintiff, and their motion for a directed verdict on the ground that plaintiff had failed to establish that his damage was caused by a fire originating from the railroad or by any negligent or other act of either defendant, and a jury which returned a verdict for \$4,010.50. From an order denying their motion to dismiss the action as to the Great Northern Railway Company, denying their motion to substitute John Burton Payne as sole defendant, denying the motion of the railway company for judgment notwithstanding the verdict or for a new trial, defendants took separate appeals. Modified on reargument and affirmed.

M. L. Countryman and Baldwin, Baldwin, Holmes & Mayall, for appellants.

Rollo N. Chaffee and A. E. Parker, for respondent.

Arnold & Arnold, as amici curiae, filed a brief.

DIBELL, J.

Action to recover damages caused by a fire alleged to have been started on the right of way of the defendant Great Northern Railway Company by one of its locomotive engines. There was a verdict against the railway company and the director general of railroads. Afterwards the agent of the President was substituted in place of the director general. The court refused to substitute the agent in place of the defendant railway company and to dismiss the latter. The defendant railway company and the defendant agent of the President separately appeal from

the order of the court denying the alternative motion for judgment or for a new trial, and refusing to dismiss the action against the railway company, and refusing to substitute the agent of the President in place of the railway company.

The defendants urge these points:

(1) That the evidence does not sustain a verdict finding either defendant liable for the fire which destroyed the plaintiff's property.

(2) That there is a defect of parties plaintiff because an insurance company paying a loss on the property destroyed was not joined as plaintiff.

(3) That the agent of the President should have been substituted in place of the defendant railway company and the railway company dismissed from the action.

(4) That the agent of the President is not liable for a loss occurring by reason of the fire starting on the right of way during the Federal operation of the road, that is, that the government incurred only the ordinary liability of a carrier and not the liability imposed by statute upon railroads for the results of a fire starting on the right of way.

1. The plaintiff owns a tract of land in St. Louis county about a mile and a quarter south and a like distance east of mile post 67. There is evidence that on October 10, 1918, a fire was started by a railway locomotive on the right of way at mile post 67. There was an effort by the railway men to put it out. It smouldered on the eleventh. On the twelfth the wind arose and fanned it into a blaze and it reached the plaintiff's property. There were numerous other fires about. The jury might find fairly that the fire, which started on the right of way on October 10, joined with other fires, and that it was a material element in the destruction of the plaintiff's property on October 12. With these facts established there was liability within *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.* 146 Minn. 430, 179 N. W. 45. The facts are in dispute, but the verdict is sustained by the evidence.

2. The defendant claims there was a defect of parties plaintiff. The answer alleges on information and belief that there was insurance on the plaintiff's property under a policy of the Minnesota standard form; that the insurance company, the name of which was unknown, paid

the plaintiff; and that the insurer by the terms of the policy, as well as by general law, was subrogated to a part of the plaintiff's cause of action and was a necessary party plaintiff. It is conceded that this was not a sufficient pleading within *Ringquist v. Duluth, M. & N. Ry. Co.* 145 Minn. 147, 176 N. W. 344. The amended reply admitted that the plaintiff had insurance with the St. Louis County Farmers Mutual Insurance Company which it may be assumed was not a company using the Minnesota standard form policy, and that some insurance was paid, and it alleged that any rights acquired by the insurance company by its payment had been assigned to the plaintiff. These allegations of the reply stand denied by force of the statute. There was no amendment of the answer. There was no proof. Plaintiff's reply was not offered as an admission. The insurance company is not identified either by pleading or by proof. The plaintiff contends, and it may be with some force, that in no event could his statement in his reply as to the insurance be taken as an admission without the accompanying statement as to the assignment. *Ryan v. Simms*, 147 Minn. 98, 179 N. W. 683. Again, it may be noted that it does not appear by a distinct allegation when the insurance was paid. If paid after suit brought, the suit could be continued in the plaintiff's name. *Nichols v. Chicago, St. P. M. & O. Ry. Co.* 36 Minn. 452, 32 N. W. 176. The question whether an insurer which has paid a loss and has become subrogated to a right in a part of the cause of action is a necessary party plaintiff, is one upon which the authorities do not agree. The question was left undetermined in the *Ringquist* case without an intimation as to what the holding ought to be and we leave it so now. It is best that it be determined when some vital right is involved and counsel and the court are spurred to an intensive consideration of the question. The plaintiff could easily have avoided making law on the question, and the defendant could easily have made the question necessary of decision. There is no difficulty in holding that the question is not sufficiently raised. If the defendants are fearful of being responsible for a double payment, or of being annoyed by a claim for it, advantage may be taken of the suggestion as to a release made in the trial court's memorandum, and acceded to in plaintiff's brief here. The judgment is within the control of the trial court and the arrangement suggested can be carried out.

3. The court substituted the agent of the President appointed under the transportation act of February 28, 1920 (41 St. c. 91, p. 456), for the director general of railroads. It refused to substitute him in place of the defendant railway company.

Prior to the transportation act we held it proper to join the director general, and refused to dismiss as to the railroad company. *Lavalle v. Northern Pacific Ry. Co.* 143 Minn. 74, 172 N. W. 918, 4 L.R.A. 1659; *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440; *Palyo v. Northern Pacific Ry. Co.* 144 Minn. 398, 175 N. W. 687; *Ringquist v. Duluth, M. & N. Ry. Co.* 145 Minn. 147, 176 N. W. 344; *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.* 146 Minn. 430, 179 N. W. 45.

Section 206 (a) of the transportation act provides for the bringing of an action against the agent of the President when the action is of such a character that it might have been brought against the carrier prior to the Federal Control Act.

Section 206 (d), (e) and (g) are as follows:

"(d) Actions, suits, proceedings, and reparation claims, of the character above described pending at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a).

"(e) Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210.

"(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

There is no decision of controlling authority as to the propriety of making or keeping the railway company a defendant when either the director general or the agent of the President is a party. Courts have differed. The question can only be set at rest by a decision of the

Federal supreme court. Wisconsin held as we held in the cases cited. After the passage of the transportation act it substituted the agent of the President as sole defendant in place of the railway company and the director general. *Gundlach v. Chicago & N. W. Ry. Co.* 172 Wis. 444, 179 N. W. 985. There are other cases in harmony with this holding. There is much to be said in support of the claim that the agent should be substituted and the railway company relieved. We appreciated the force of a similar argument when the roads were under Federal control through the director general, and do not disparage the argument now made. The question presented is not so different from those involved in the cases cited that we are disposed to substitute the agent of the President for the railway company. If we are in error the substantial rights of the parties are not affected other than as they are put to the expense of a correction of the error. If a final judgment for the plaintiff is paid, as contemplated by section 206 (e), the railway company will not be affected. It is protected by section 206 (g), if it is finally held that the liability is one for which the government is liable.

4. Under G. S. 1913, § 4426, absolute liability is placed upon every railroad corporation owning or operating a railroad in this state for damage done by fire communicated directly or indirectly by its locomotive engines. The contention now is that the liability of the director general or the agent of the President extends only to so-called common carrier liabilities and not to the liability imposed by the statute. A contrary holding was made in *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.* 146 Minn. 430, 179 N. W. 45, and we adhere to it.

We do not think it necessary to discuss the objection to the charge in respect of the necessity of the railroad fire being a material element in the destruction of the plaintiff's property. It was correct. We cannot say that it should have been repeated or amplified.

Order affirmed.

A reargument of the questions considered in subdivision 3 of the opinion having been granted, on June 29, 1921, the following opinion was filed:

DIBELL, J.

5. A reargument was granted upon the questions considered in paragraph 3 of the opinion. We there held that it was not error to refuse to substitute the agent of the President for the railway company and to deny the railway company's motion to dismiss.

In *Missouri Pac. R. Co. v. Ault*, 256 U. S. 554, 41 Sup. Ct. 593, — L. ed.—reversing *Missouri Pac. R. Co. v. Ault*, 140 Ark. 572, 216 S. W. 3, it is held that the director general should have been substituted for the railroad company, and the company dismissed from the action. The case is of controlling applicability upon the motion in the present case to substitute the agent of the President and dismiss the railroad company. Following and applying it, our former holding upon this point, stated in paragraph 3, is vacated, and the Lavalley case and other cases there cited, holding to the contrary, are overruled. The agent of the President should be substituted and the railroad company dismissed. Upon the going down of the remittitur the court will modify the order as indicated; otherwise it will stand affirmed.

Modified and affirmed.

ANNA RITTLE v. ST. PAUL CITY RAILWAY COMPANY.¹

June 3, 1921.

No. 22,286.

Charge to jury error.

1. That a passenger in a street car falls over a sample case which another passenger has placed on the floor beside him does not, as a matter of law, establish the street-car company's negligence, and the court's instruction that, if the sample case was so placed and plaintiff fell over it, she was entitled to damages, unless she was guilty of contributory negligence, was erroneous.

Impeachment of witness — affidavit admissible in evidence.

2. An affidavit by plaintiff, offered by defendant to impeach her testimony, should have been received. Proper foundation for its reception

¹Reported in 183 N. W. 146.

was furnished by a witness who testified that he correctly read it to her before she signed it.

Action in the municipal court of St. Paul to recover \$500 for injuries received while a passenger in defendant's street car. The answer alleged plaintiff's negligence. The case was tried before Boerner, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$200. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

C. J. Menz, J. H. Hintermister and W. D. Dwyer, for appellant.
Drill & Drill, for respondent.

HOLT, J.

Plaintiff took passage in defendant's street car. She sat down in the long right-hand seat near the cross seats and placed her suit case under her right leg. A few blocks from her destination a traveling salesman, Mr. Houck, boarded the car, and, seating himself on the left of and next to plaintiff, placed his suit case to his left and a simple case to his right, between himself and plaintiff. He testified that the sample case, which was 17 inches long, 9 inches wide and 11 inches high, was placed up against the seat and under his right knee or leg. Plaintiff's testimony is that it was not in that position. When she rose to leave the car she struck her foot against it, or else the motion of the car caused her to stumble over the case and falling her left knee was hurt. In this action for damages she recovered a verdict. Defendant's motion for judgment non obstante or a new trial was denied and it appeals.

While the questions of defendant's negligence and plaintiff's contributory negligence were close to the border line, we conclude they were for the jury, and hence defendant is not entitled to judgment notwithstanding the verdict.

Defendant is a common carrier of passengers and must use the highest degree of care for their safety consistent with the practical carrying on of its transportation business. Passengers carry suit cases and packages of various sorts. These in a street-car cannot well be placed in a special compartment or be given in charge of anyone, nor can the owner always

hold them or dispose of them so as to avoid contact with fellow passengers. Indeed, the feet of those seated in the long seats and of those standing in the so-called aisle between, are often stumbling blocks to others. It cannot be said as a matter of law that it is negligence to permit the owner of a sample case, such as the one in question, to place it on the floor beside him. It readily may be so set down that no one, in the exercise of due care, would consider it a source of danger to any one. That passengers may be permitted to place satchels and parcels on the floor of a street car without subjecting the street-car company to the charge of negligence, as a matter of law, is the conclusion reached in the well considered cases of *Pitcher v. Old Colony St. Ry. Co.* 196 Mass. 69, 81 N. E. 876, 13 L.R.A. (N.S.) 481, 124 Am. St. 513, 12 Ann. Cas. 886, and *Lyons v. Boston Elev. Ry. Co.* 204 Mass. 227, 90 N. E. 419. In the *Lyons* case Justice Rugg, after stating the well known fact that passengers do carry bundles into street-cars and place them on the floor, says:

"It is too onerous a burden to require the defendant to act on the theory that every one of its passengers is likely to be careless as to his fellows. The defendant might rely upon its patrons not to be heedless of the safety of others in this respect. The fact that one out of many violated his duty does not in and of itself render the defendant liable. There must at least be some notice to the defendant of such conduct before it can be charged with responsibility."

The negligence of defendant cannot therefore be predicated on the simple proposition that the sample case was permitted to be on the floor, or that plaintiff stumbled and fell over it. It would depend, in the first place, upon whether the case was so placed that danger therefrom might be apprehended; and in the next place, whether the person in charge of the car, the conductor, knew, or, in the exercise of due care, should have known thereof.

The court, in the abstract, instructed correctly upon the degree of care expected of defendant, but when applying the rule to the facts of the case the charge was erroneous and misleading. The erroneous part was this: "Now, the burden of proof in this case rests upon the plaintiff to establish negligence on the part of the defendant, that is, she must establish to your satisfaction by a fair preponderance of the evidence

that this sample case was in the aisle, and that she actually fell over it. You will remember her testimony and the testimony of the other witnesses on this point, and if you find from this testimony that the sample case was in the aisle and that she fell over it, and that she was not guilty of any contributory negligence herself in leaving the car, then you will be entitled to find a verdict in her favor."

It is clear that this amounted to a peremptory instruction to find defendant guilty of negligence, for there was no dispute but that plaintiff fell over the sample case which was in the aisle or space between the long seats. Before the jury retired the court's attention was directed to the error and an exception saved. Plaintiff's counsel then insisted that the charge was correct, and the court did not clarify or better the situation by this statement: "The jury has heard the charge of the court, and will take into consideration the place where the sample case was, take into consideration whether or not the plaintiff was guilty of any contributory negligence in going out as she did." The knowledge which the conductor had, or, in the exercise of the care required, ought to have had of any negligent disposition of the sample case was nowhere in the instructions referred to as one of the all important facts determinative of defendant's negligence.

The affidavit obtained by defendant's claim agent from plaintiff should have been received. The claim agent testified that he read it over correctly to plaintiff before she signed it. This was a sufficient foundation regardless of plaintiff's memory. It was properly admissible to impeach her testimony on the witness stand. Had that been the only error, it would not have caused a new trial, for the claim agent was permitted to testify as to all that the affidavit contained of an impeaching character.

For the error in the charge there must be a new trial.

Order reversed and a new trial granted.

ROY WOLLENSCHLAGER v. MINNEAPOLIS, ST. PAUL &
SAULT STE. MARIE RAILWAY COMPANY.

DUXBURY & BISSELL, APPELLANTS FROM JUDGMENT
OF DISMISSAL.¹

June 3, 1921.

No. 22,290.

Dismissal of action — sufficient cause.

1. While the district court may at any time before trial, upon application by the plaintiff and sufficient cause shown, dismiss an action, yet such cause must relate to and affect the legal rights of the parties litigant.

Evidence insufficient.

2. Record examined and *held*, that it discloses no legal cause for the dismissal of the action.

Action in the district court for Ramsey county. The facts will be found in the opinion. The motion of plaintiff for the abatement of the action brought by Duxbury & Bissell until a final determination of the action begun by John D. Greathouse, was granted by Haupt, J., and the former action dismissed without prejudice. From the judgment of dismissal, entered pursuant to that order, defendant company and Duxbury & Bissell took separate appeals. Reversed.

John E. Palmer, John L. Erdall and Duxbury & Bissell, for appellants.

John D. Greathouse and Hiram D. Frankel, for respondent.

QUINN, J.

Plaintiff was injured while acting as a rear brakeman on one of defendant's freight trains, through the alleged negligence of the company in operating its train. He went to a hospital for treatment.

¹Reported in 183 N. W. 144.

While there he employed respondent, John D. Greathouse, as his attorney to bring an action against the company to recover for his injury, agreeing to allow him a certain per cent of the amount recovered for his services. An action was accordingly brought in Hennepin county, and, while pending, the plaintiff signed, and caused to be filed in court, a dismissal of such action, and employed the law firm of Duxbury & Bissell to bring another action for the same purpose, agreeing to allow them a certain per cent of the amount recovered for their services. Pursuant to such arrangement, that firm, on October 21, 1920, brought this action in Ramsey county. On the following day, October 22, Greathouse visited plaintiff at the hospital and a letter was written to Duxbury & Bissell, which plaintiff signed, discharging them as his attorneys. He also signed a dismissal of the action which that firm had brought, which proved of no avail as the venue in the notice of dismissal was laid in Hennepin county. Again on the following day, October 23, Greathouse brought another action in Hennepin county upon the same cause of action, and also procured an order to show cause in Hennepin county why the Ramsey county case should not be dismissed. Upon hearing, this order was discharged. On October 30, plaintiff signed and caused to be served another dismissal of the Ramsey county case. The railway company refused to accept the dismissal, upon the ground that plaintiff had once dismissed the action and could not have another dismissal without an order of the court or consent of the defendant, under G. S. 1913, § 7825, and at the same time filed its objection with the Ramsey county court, and served its answer in the case last brought, pleading therein as a bar the pending action in Ramsey county.

On November 9 plaintiff, through his attorney, Greathouse, procured an order to show cause "why the court should not make its order requiring the defendant to accept the dismissal served upon the defendant by John D. Greathouse, attorney for plaintiff, on or about the 1st day of November, 1920, and why the said dismissal shall not be as and for a dismissal of the said action commenced by the said Duxbury & Bissell, for the said plaintiff, and why the said dismissal should not stand and be a dismissal without prejudice and without a determination of the merits of the said matter." This order to show cause was supported by the affidavits of plaintiff and his mother, to the effect that the plaintiff

had been induced to discharge Greathouse in the first instance and to dismiss the first action brought, by misrepresentations made to him by persons representing the law firm of Duxbury & Bissell. This showing was met by affidavits of both Mr. Duxbury and Mr. Bissell, in which they denied ever having a representative in their employ authorized to make any such representations and denying the truthfulness of the matters set forth in plaintiff's affidavits. An affidavit was filed by the attorney for the railway company setting forth the various steps taken in the litigation. In disposing of this order to show cause the trial court, after reciting the formal matters, ordered "that the above entitled action be and the same is hereby dismissed without prejudice." Judgment of dismissal was entered upon said order on November 13, 1920, from which judgment the defendant railway company and the law firm of Duxbury & Bissell appeal.

At the hearing upon the order to show cause it was insisted on behalf of respondent that Mr. Greathouse was the only authorized attorney in the proceeding. This contention is hardly sustained by the record, as it appears therefrom that the firm of Duxbury & Bissell brought the action and appeared therein upon the return of the order to show cause. If the plaintiff wished to dispose of the services of counsel so appearing, he should have proceeded under the provisions of section 4953, G. S. 1913, which provides: "The attorney in an action or proceeding may be changed at any time upon his consent, or, by order of the court, upon the application of the client for cause; but no change can be made on application of the client unless the charges of the attorney be paid. When such change is made, written notice of the substitution of a new attorney shall be given to adverse parties; until such notice, they shall recognize the former attorney." Respondent did not proceed under this statute, nor was the question of a change of attorneys before the court.

The order of the trial court does not disclose the cause of dismissal of the action. Section 7825 of the statute provides that an action shall not be dismissed more than once without the written consent of the defendant, or an order of the court on motion and for cause shown. This power the court assumed to exercise in this case. The nature and scope of the three actions are identical, all based upon the same cause of action. In defense to the third action the defendant railway company

pleaded the pendency of the second action in abatement. If the plea be sustained by the proofs it constitutes a complete defense. While the statute authorizes the court to dismiss an action upon sufficient cause shown, it must be such a cause as relates to and affects the legal rights of the parties. To that end the court will examine the proof to ascertain whether it furnishes a legal basis for dismissal.

We have examined the record with care and have reached the conclusion that it discloses no legal cause for the dismissal of the action. It is manifest that the learned trial court based its order upon the tactics claimed to have been practiced upon plaintiff in the selection of an attorney to try his cause, or upon the almost unprecedented race to the hospital, neither of which amounts to a sufficient legal cause for a dismissal of the action. The railway company was clearly within its legal rights in refusing to accept the dismissal.

Reversed.

ALMA E. MALMQUIST AND OTHERS v. CAROLINE PETERSON
AND ANOTHER.¹

June 3, 1921.

No. 22,294.

Vendor and purchaser — option contract — waiver of default.

A provision in an option contract for the sale of land, requiring the option to be exercised within a specified time, may be waived. Waiver does not necessarily rest on contract. It, after default in performance of a contract within the time stipulated, the party entitled to take advantage of the default, with knowledge of the facts, treats the contract as still in force, or deals with the other party in a manner consistent only with a purpose on his part to regard the contract as still subsisting and not terminated by the default, he waives the default.

Action of ejectment in the district court for Hennepin county and to recover \$1,428 for rent of the premises. The case was tried before

¹Reported in 183 N. W. 138.

Hale, J., who made findings as set out in the opinion and ordered plaintiffs to convey the premises to Caroline Peterson within 30 days, upon payment to plaintiffs of \$575.03, and that if plaintiffs should refuse proper conveyance by quitclaim deed, then the judgment should stand as a conveyance of the property. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

Charles E. Smith and Thompson, Hessian & Fletcher, for appellants.
Phil. T. Megaarden and Edward Chalgren, for respondents.

HALLAM, J.

In March, 1909, defendant Caroline Peterson owned a lot in Minneapolis on which was situated a two-story duplex dwelling. It was encumbered by a mortgage which had been foreclosed by sale made some six months before and also by a second mortgage to Lydia K. Carlson. The aggregate of these encumbrances was over \$2,000. Defendants were unable to redeem from the foreclosure sale or to pay the second mortgage, and their friend John B. Johnson came to their rescue. The Petersons gave to Johnson a quitclaim deed of the property, the deed expressing a consideration of one dollar, and Johnson executed a written agreement, reciting this deed, reciting that the deed was given "in consideration of a mortgage which they owed me on said place, which I have agreed to satisfy and to satisfy and pay all other encumbrances against said property," and that "it is my intention to make certain improvements and alterations in the buildings on said premises in the next few months" and then containing the following language:

"Therefore, it being understood that said Caroline Peterson desires to buy the said property back again,

"Now, therefore, in consideration of said conveyance I do hereby agree with them;

"That if at any time within three months from this date they want to buy said property back, that I will sell it to them at a price which will amount to the total amount expended by me on said property up to such time in addition to the amount now owing me on said mortgage, and the amount of other mortgages, taxes and incumbrances which I may have to pay on said property, and in addition thereto the amount of six per

cent interest on the amounts so paid by me from the time I have to pay them and six per cent interest on what they are now owing me.

"All to be computed as aforesaid into a lump sum to be used as the purchase price. And I agree to sell it to them for such price on a regular sale contract by their paying down \$25 or more and then \$25 or more per month on the contract. Deferred payments to bear interest at the rate of six per cent per annum, payable semiannually. This agreement hereby made is to be considered an option only, and to be absolutely terminated if not taken up by the time stated."

Pursuant to said agreement Johnson procured an assignment of the sheriff's certificate of the foreclosure sale mentioned, and an assignment of the Carlson mortgage. Defendants were, at the time of this transaction, occupying the lower apartment of said house. After completion of the transaction they moved upstairs and have ever since occupied the upper apartment without payment of rent. They paid taxes on the whole property down to the time of Johnson's death, which occurred in September, 1917, paid the water meter tax on both apartments, and from time to time made repairs and improvements upon the premises, amounting in all to about \$600, and from time to time over this period of years paid to Johnson on said contract various sums, aggregating \$665. During all this period Johnson and his successors in interest have collected rent from the lower apartment. The amounts received from the sources mentioned have been sufficient to pay the interest on the money advanced by Johnson and to reduce the principal to \$575.03. The premises are of the reasonable value of \$4,000.

After Johnson's death, plaintiffs, who are his heirs, commenced this action to eject defendants from the premises and to collect rent from May, 1909, amounting to \$1,428. Defendants answered, offering to pay the sum of \$575.03 alleged to be due under the contract, and asking for a decree of conveyance of the premises on payment of said sum with interest. The court found that it was the intention of Johnson and defendants to at all times continue said contract in force; that Johnson waived the provisions of the contract with reference to repayment within these months of the sums so agreed to be paid, and that accordingly the contract had not expired and the option thereby created had not terminated, and ordered judgment that if defendant shall pay the bal-

ance due within 30 days after entry of judgment, they shall be entitled to a conveyance of the property. Plaintiffs appeal.

We are of the opinion that the trial court was right. Undoubtedly Johnson could waive the provision requiring the option to be exercised within three months. If he waived the time requirement, then the option might be exercised after the time expired. Whether he did waive the time requirement is the important question in the case. We think the evidence clearly sustains the court's finding that he did do so. The repeated receipt of payments on the purchase price after the three months expired, together with acquiescence in defendants' possession, and in their making valuable improvements and repairs and in their payment of taxes and charges year after year, together with certain admissions of Johnson himself recognizing the continued interest of the Petersons in the property, leave no room for any conclusion other than that reached by the trial court.

Plaintiffs argue that there could not be an extension of the option without a new consideration. No doubt a contract for an extension, like any other contract, in order to be binding, must be supported by a consideration. We do not wish to be understood as holding that no consideration has been shown, but prefer to place our decision on the ground that waiver does not necessarily rest on contract. "Where by the course of conduct of one party to a contract, entitled to the performance of certain terms or conditions thereof, the other party has been led to believe, as a man of average intelligence, that such performance will not be required, until it has become too late to perform, or until to insist upon performance would work material injustice, the person who has so conducted himself is barred from asserting the right he had." Bigelow, Estoppel (6th ed.) p. 717.

This court has held that, if, after default in performance of a contract within the time stipulated, the party entitled to take advantage of the default, with knowledge of the facts, treats the contract as still in force or deals with the other party in a manner consistent only with a purpose on his part to regard the contract as still subsisting and not terminated by the default, he waives the default. In such event, strict performance according to the terms of the contract having been waived, a reasonable time and opportunity should be allowed to the

vendee in which to make payment. *Quinn v. Olson*, 34 Minn. 422, 26 N. W. 230. The facts of this case bring it well within the rule of the case cited, and we reaffirm it and apply it.

Order affirmed.

FARMERS STATE BANK OF GARDEN CITY v. LOUISA
B. COOKE.¹

June 3, 1921.

No. 22,303.

Bills and notes — Fraud in inception — burden of proof on holder.

1. When it was shown that negotiable promissory notes were obtained by the fraud of the payee, the burden of proving that it became a holder in due course was cast on a bank to which they were indorsed by the payee without recourse.

Question of good faith of holder for the jury.

2. Although the testimony that the notes were purchased in good faith was not directly contradicted, the inferences to be drawn from all the circumstances might lead to a different conclusion by reasonable men, and hence the question of whether the bank was a holder in due course was properly submitted to the jury.

Action in the district court for McLeod county to recover \$1,000 upon two promissory notes. The defenses interposed are given in the second paragraph of the opinion. The case was tried before Tift, J., who at the close of the testimony denied plaintiff's motion for a directed verdict on the grounds that the defense had wholly failed to prove any defense and defendant had shown herself grossly negligent at the time the instruments were signed, and a jury which returned a verdict in favor of defendant. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, plaintiff appealed. Affirmed.

¹Reported in 183 N. W. 137.

C. O. Dailey, for appellant.

O. G. Odquist, for respondent.

LEES, C.

Plaintiff brought this action against defendant as the maker of two promissory notes of \$500 each which had been indorsed by the payee without recourse.

Defendant interposed three defenses: The first, that she had not signed the notes; the second, that they had been procured by fraud and that plaintiff was not a holder in due course; and the third that, if she signed the notes, her signature was procured by fraudulent representations as to their nature and terms and that she was free from negligence.

There was a trial by jury and a verdict for the defendant, and plaintiff has appealed from a denial of its alternative motion for judgment notwithstanding, or for a new trial.

The evidence relating more or less directly to the second defense tended to show that defendant is a widow, 58 years old, who has lived nearly all her life on a farm near Hutchinson in this state. She had a high school education, had been a school teacher for two or three years, and had transacted business with Hutchinson banks for about 30 years, depositing money and issuing checks in the usual way. She knew what a promissory note was and had taken many of them. On April 25, 1917, Franklin C. Stevens, a stranger to her, called at her house and asked her to purchase stock in the Northwestern Mortgage, Loan & Land Company of Minneapolis. He read the company's prospectus to her. She was unable to read it without her glasses, which were upstairs and she did not get them. Stevens told her the investment would be good, that the company was flourishing and doing a fine business. She agreed to take five shares of stock at \$100 each. He told her she did not have to pay for it at the time and spoke of notes to be given to the company. He read no notes to her, but did read an agreement to take stock, and she signed an application for the stock, relying on what he read to her. Just above her signature these words appear:

"Cash..... dollars (\$)

Note five hundred dollars (500) due April 25, 1918."

The following day Stevens returned and took her application for an

additional five shares of stock, and in substance the transaction was identical with that which took place the day before. Defendant has never received any stock or other consideration for the notes.

The plaintiff bank is located in a small town south of Mankato. On April 28, 1917, Stevens came to the bank with two notes bearing defendant's signature and offered them for sale. E. H. Monroe, as cashier of the bank, purchased them, giving Stevens the bank's certificate of deposit for \$985. Each note was payable to Stevens individually. One was dated April 25 and the other April 26, 1917, and each was payable one year after date, with interest at five per cent per annum. These are the notes on which suit was brought. We are of the opinion that the evidence was sufficient to justify the jury in finding that defendant had established her second defense.

Stevens was not called as a witness and we have only the defendant's own version of the circumstances under which the notes were procured. If her version is correct, he obtained them by falsely representing to her that no notes were to be executed until she got the stock, that they were to run to the company, and that at the end of a year she might return the stock. Her credit was good at the Hutchinson banks, but it does not appear that Stevens offered the notes to those banks for discount. Garden City is a small place remote from the district where defendant lived and was known. The notes were transferred two days after Stevens obtained them. Monroe knew they had been taken for stock in the land company and that they did not run to the company, but to Stevens. He knew that Stevens had organized the company and was a stockholder and president. Monroe became a stockholder in April, 1916, and, at the time of the trial, was a director and secretary. Stevens had then ceased to be an officer. From 1908 to 1913 Monroe was employed as book-keeper in a Hutchinson bank where defendant had a checking account. He had no acquaintance or business dealings with her after 1913, and none before, aside from his acquaintance with her as a customer of the Hutchinson bank. He did not see her application for stock before he bought the notes. He did not inquire why they were payable to Stevens instead of to the company, nor did he make any inquiry of the defendant with reference to the notes. He did not require Stevens to assume liability as an indorser.

When it was shown that the notes were obtained by the fraud of the payee, the burden of proving that it became a holder in due course was cast on the plaintiff. In recent decisions we have sustained the submission of the question to the jury where there was no contradiction of testimony that a note was purchased in good faith, but the inferences to be drawn from all the circumstances might lead to a different conclusion by reasonable men. *State Bank of Rogers v. Missia*, 144 Minn. 410, 175 N. W. 614; *First Nat. Bank of Rolette v. Andersen*, 144 Minn. 288, 175 N. W. 544; *McWethy v. Norby*, 143 Minn. 386, 173 N. W. 803; *First Nat. Bank of Phillips v. Denfeld*, 143 Minn. 281, 173 N. W. 661; *Snelling State Bank of St. Paul v. Clasen*, 132 Minn. 404, 157 N. W. 643, 6 A. L. R. 1663; *Cole v. Johnson*, 127 Minn. 291, 149 N. W. 467.

The court instructed that if the jury found that the notes were procured by fraud and that the agents or officers of the plaintiff had knowledge or notice of that fact, their verdict should be for the defendant. The giving of this instruction is assigned as error. We think it was a correct statement of the law, for plaintiff could not be a holder in due course, if the state of facts referred to in the instruction existed. Without objection by the plaintiff, the court also submitted to the jury the other two defenses interposed, instructing them to take them up in their order, and, if they found that either of them was sustained by the evidence, their verdict should be in defendant's favor. Granting that the evidence did not justify the submission of either the first or third defense, plaintiff is not in a position to complain, for it neither objected nor excepted to their submission.

Since there was sufficient evidence to permit the jury to find that plaintiff was not a holder in due course, and for aught that appears in the record the verdict may have been returned on that theory, we are of the opinion that the order denying a new trial should be and it hereby is affirmed.

ROY GUEST v. NORTHERN MOTOR CAR COMPANY.¹

June 10, 1921.

No. 22,169.

Grant of new trial because of insufficient evidence appealable, when.

1. An order granting a new trial for insufficiency of the evidence to sustain the verdict, is appealable where a previous verdict in favor of the appellant has been set aside on the same ground. It is immaterial whether the two orders were made by the same judge or by different judges.

Vacating second verdict for same reason as the first.

2. The court, in passing on the insufficiency of the evidence to support the second verdict, was in the exercise of the same judicial discretion called for in passing on the first, with the limitation that great caution should be used in vacating a second verdict when the first was vacated on the same ground.

Discretion of court.

3. There was no abuse of discretion in the instant case.

Action in the municipal court of Minneapolis to recover \$953.84 for breach of warranty in the sale of a tractor. The case was tried before Baldwin, J., and a jury which returned a verdict for \$90. From an order granting a new trial, plaintiff appealed. Affirmed.

Courtney & Courtney, for appellant.

Jamison, Stinchfield & Mackall, for respondent.

HOLT, J.

Plaintiff sued for the breach of a warranty given upon the sale of a tractor. The jury returned a verdict for the full purchase price paid. On defendant's motion for a new trial because of excessive damages, the court made an order that, if plaintiff returned the tractor to defendant within a given time, the motion would stand denied, but if

¹Reported in 183 N. W. 147.

plaintiff failed to return it there should be a new trial upon the sole issue of the value of the tractor. Plaintiff refused to return the tractor and a trial was had before another judge, resulting in a verdict finding its value to be \$90. Defendant moved for a new trial because of inadequacy of the verdict. Plaintiff appeals from the order granting the motion.

Defendant contends that the order is not appealable. But subdivision 4, § 8001, G. S. 1913, contains this: "Provided further that where the trial court has once granted a new trial in the exercise of its discretion, on the ground that the evidence is not sufficient to support the verdict, an appeal may be taken from any subsequent order granting a new trial wholly or in part upon that ground." The damages awarded plaintiff in the first trial as well as the inadequate valuation fixed upon the tractor in the second trial, which results in again awarding plaintiff large damages, were alike deemed excessive because of the insufficiency of the evidence to support the sum awarded. So that the appeal comes within the express provision quoted. We do not think the fact that the two orders granting the new trials were not made by the same judge affects the question. The statute was enacted to protect the rights of the litigants. We hold the order appealable.

But we do not sustain plaintiff's contention that the court presiding in the last trial must permit the verdict to stand notwithstanding its lack of supporting evidence. The court, when moved to set aside the second verdict for that cause, must still exercise judicial discretion in passing on the motion. The only limitation is that in such a case a new trial should be granted cautiously. *Ladwig v. Supreme Assembly E. F. U.* 125 Minn. 72, 145 N. W. 798, and the cases therein cited.

There was no abuse of discretion. Plaintiff fixed the value less than the verdict, and even testified that the tractor was worth nothing. But it is to be noted that rather than return the tractor he chanced the expense of a trial to determine at what price he might keep it. The testimony is practically undisputed that its construction cost is over \$400. Of course the value of a machine depends very largely upon its capability of doing the work expected of it. But this in turn depends to a great extent on how it is operated and the conditions under which it is run. That because upon certain hills and soft spots on

plaintiff's farm it failed, does not prove that it will not work efficiently on other farms. The record discloses reasonable grounds for the action of the court below.

Order affirmed.

IN THE MATTER OF THE APPEAL OF LINTON L. SARTELL
FROM THE ACTION OF THE COUNTY BOARD IN THE
MATTER OF THE PETITION FOR THE ENLARGEMENT
OF SCHOOL DISTRICT NO. 5.

LINTON L. SARTELL v. COUNTY OF BENTON AND
ANOTHER.¹

June 10, 1921.

No. 22,251.

Enlargement of school district — act of county board arbitrary.

On appeal from the order of the county board refusing to enlarge a school district, the order being legislative and not subject to reversal unless arbitrary and without due regard to the public interests, the evidence sustains a finding of the jury, approved by the trial court, that the act of the county board was arbitrary and without due regard to public interests.

From an order of the county board of Benton county denying a petition for the enlargement of district No. 5 of Stearns county, Linton L. Sartell, treasurer of that school district, appealed to the district court for Benton county, on the grounds that best interests of the territory affected required that that portion of school district No. 3 of Benton county, situated within the municipal limits of the village of Sartell in Benton county, should be separated from school district No. 3 of Benton county and included within the boundaries of school district No. 5; that the part of district No. 3 within the village of Sartell lies about three miles from the school building maintained by district

¹Reported in 183 N. W. 148.

No. 3 in the village of Sauk Rapids. The appeal was heard by Nye, J., who made findings and reversed the decision of the county board. From an order denying their motion for a new trial, defendants appealed. Affirmed.

E. W. Swenson, M. J. Daly and Donohue & Quigley, for appellants.
R. B. Brower and J. D. Sullivan, for respondent.

DIBELL, J.

Linton L. Sartell, treasurer of school district No. 5 in Stearns county, appealed to the district court of Benton county from an order of the county board made November 2, 1915, denying a petition for the enlargement of District No. 5 by including therein certain lands in school district No. 3 in Benton county.

The court submitted to a jury the following question which was answered as indicated: "Did the county board act arbitrarily and without due regard for the best interests of the public in refusing to grant the petition of the legal voters of district No. 5? Answer: Yes."

The defendants appeal from the order denying their motion for a new trial. The question is whether the evidence sustains the finding of the jury.

The act of the county board in enlarging a school district is legislative, and it will not be disturbed on the appeal given by statute, unless it was made upon an erroneous theory of law, or was arbitrary or in disregard of the best interests of the public. The idea has been variously phrased in different cases involving the general question. *Severts v. County of Yellow Medicine*, 148 Minn. 321, 181 N. W. 919, and cases cited; *Independent School District No. 47 of Meeker County v. Meeker County*, 143 Minn. 169, 173 N. W. 850, and cases cited; *Hall v. Board of Co. Commrs. of Chippewa County*, 140 Minn. 133, 167 N. W. 358; *Farrell v. County of Sibley*, 135 Minn. 439, 161 N. W. 152.

The village of Sartell was organized in 1907. It is on both sides of the Mississippi river. The part west of the river is in Stearns county and the part east of the river is in Benton county. West of the river the village is in school district No. 5 of Stearns county; east of the river it is in school district No. 3 of Benton county. In 1905 the Watab Pulp and Paper Company commenced the construction of its

plant on the east side of the river, in what is now a part of the village of Sartell, and the plant began operations in 1907. The people live chiefly on the west side of the river, though some are on the east side. The railroad following along the river is on the east. There is a substantial wagon and foot bridge across the river. Sauk Rapids is 2 or 3 miles south on the east side of the river. It is in district No. 3. It has a first-class high school. It maintains a bus carrying pupils to and from Sartell. The portion of Sartell within the district is about 140 acres in extent and has for years largely contributed by taxation to the support of the Sauk Rapids schools. The figures available for 1913, 1914 and 1915 indicate that it paid as much as one-third of the total taxes of the district. The taxes which it pays in district No. 5 are nominal. The west end of its dam and perhaps a small amount of other property is taxable there. A common school taking pupils through the eighth grade is maintained in district No. 5. The district lacks money and the school is not properly equipped. From 1907 to 1915 inclusive the levy of school taxes in district No. 5 averaged 31.7 mills; in district No. 3 it averaged 16.4 mills. In 1913, 1914 and 1915 the school levy on property in the village on the east side of the river was on a taxable value of from \$180,000 to \$225,000. The record does not show the valuation of the portion west of the river. Taking the school levy of district No. 5 for these three years, 42, 38.9, and 36 mills, and approximating as nearly as possible the income derived, which is not definitely shown, it is clear that the taxable value of the property on the west side in the village of Sartell was but a fraction of the value on the east side.

The people in Sartell are there largely because of the Watab mill. That is the one large industry. District No. 5 is put to the support of schools for those living on the west side as most of them do. They are there because of the mill in district No. 3 and get their support from it. The schools would be efficient instead of inefficient if the district could resort to the plant for the support of the schools which its location there makes necessary. The burden of the district increases as more residents are attracted by the presence of the mill. Those who take advantage of the Sauk Rapids schools do so at much inconvenience. The bus service has not been satisfactory.

The village of Sartell is a sufficiently compact community and of sufficient size to have at least a good graded school and perhaps something more as time goes. There is every reason why the industry east of the river should contribute to the support of the schools to which it is tributary. These schools it makes necessary, if the work of the mill is to be done by residents of the village. It is a part of the community. There is much justice in the insistence of the village that the boundaries of the school district should not be such as to deprive it of the school advantages which it would have if treated as a community for school purposes. As it is, the children of the workmen in the mill are condemned to inferior schools, though the property of the community is sufficient to maintain good ones. The mill owners have recognized the justice of calling upon them for the support of the local schools, though an enlargement of the district may increase the company taxes.

The evidence sustains the finding of the jury, which has the decisively expressed sanction of the trial court, that the action of the county board was arbitrary and against the best interests of the public. We do not say that the evidence required such finding; it sustains it. What occurred at the hearing before the board was not preserved. But the board at least knew the situation. The chairman of the board was one of the remonstrants against the granting of the petition. He at least was not in a position to maintain a judicial poise in the consideration of the petition.

Complaint is made that evidence was introduced of conditions later than the time when the county board passed upon the question. All parties went far afield. When the court's attention was called to the issue, and this was when the trial was well towards an end, the evidence was restricted. So far as possible that which was objectionable, though in without objection, was stricken. We find nothing in the charge of which the defendants should complain. It went quite as far in favor of the defendants as they were entitled to ask. It is hardly necessary to say that the plaintiff was not required to prove his case beyond a reasonable doubt.

Order affirmed.

PAUL KEMP AS ADMINISTRATOR OF THE ESTATE OF
FREDERICK HOLZ, DECEASED v. EMIL HOLZ.¹

June 10, 1921.

No. 22,259.

Avoidance of gift — issue not presented by pleadings.

A claim was duly allowed against an estate, and, there being a deficiency of assets, the administrator sued defendant, alleging that he was indebted to decedent and had wrongfully converted to his use a certain savings bank deposit of decedent's, changed some six months before decedent died to the joint account of decedent and defendant, and "payable to the order of either of the survivors." The administrator conceded that the change of the account amounted to an executed gift, but claimed it to be void as against the creditor named. It is *held*:

In view of the concession and the pleading, the court was justified in finding, in effect, that there was no conversion. The complaint contained no allegation that a gift or transfer had been made to defendant, or any grounds for avoiding it in behalf of a creditor existing at the time it was made. And the court was not required to make findings on issues not presented by the pleadings and which cannot be held to have been litigated by consent.

Action in the district court for Winona county for a decree to compel defendant to disclose the amount of money or other property in his hands belonging to the estate, and to pay the same to plaintiff. The case was tried before Childress, judge of the Fifth judicial district sitting as judge of the Third judicial district, who made findings and dismissed the action. Plaintiff's motion for amended findings was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

Webber, George & Owen, for appellant.

Brown, Abbott & Somsen, for respondent.

HOLT, J.

The administrator of the estate of Fred Holz, deceased, sued defen-

¹Reported in 183 N. W. 287.

dant, alleging that Fred Holz died on November 28, 1918, leaving property; that plaintiff has been unable to find any belonging to the estate; that Anna Fleischfresser, a daughter of the deceased and a sister of defendant, made an agreement with deceased in 1912, under which he should live and board with her and pay ten dollars a month at his death; that he died without paying her; that she presented a claim therefor against the estate, which defendant contested in the probate court, but it was allowed in the sum of \$810; that it remains wholly unpaid; that in 1907 the deceased conveyed a valuable farm to defendant, without consideration, but on condition that defendant should make certain annual payments to the deceased and his wife; that these payments have not been made, and defendant owed his father at the time of his death over \$2,000 thereon. Then comes this allegation:

"The plaintiff further shows to the court upon information and belief that at the time of decedent's death he had cash and money on deposit in bank in a sum exceeding \$1,400, which sum the defendant wrongfully obtained possession of, and has ever since kept and retained, and although demand has been made upon him by the plaintiff that he turn over said sum of money to him, the defendant has refused and still wrongfully refuses to pay the plaintiff any part thereof or to account to plaintiff therefor."

The prayer for the judgment and decree of the court is "that the defendant be made to disclose the amount of money or other property in his hands belonging to the estate of the deceased and that he be required to pay the same to the plaintiff," etc.

The court found the allegations of the complaint true as to the deed-ing of the farm; the death of Fred Holz; the appointment of plaintiff as administrator of his estate; that a claim was duly allowed against the estate in the sum of \$810; that the estate has no assets with which to pay the claim; that defendant has fully performed the conditions in the deed mentioned; that he is not indebted to the estate or plaintiff, and that at the time of the death of said Fred Holz defendant had no money or other property belonging to decedent in his possession or control, and ordered a dismissal. From the judgment plaintiff appeals.

There were motions to amend the findings. They were denied.

These motions and the appeal are directed to the proposition that \$707 in a savings bank at Winona, when Fred Holz died, is available to pay the claim allowed against his estate. The undisputed facts in respect to this deposit were: About six months before his death Fred Holz asked defendant to go with him to this savings bank. At the bank he produced his pass-book upon which his name had been entered as depositor and requested the banker to also enter defendant as depositor. This was done, and above the two names the banker imprinted with a rubber stamp the following: "Joint account. Payable to the order of either of the survivors." Before so doing the banker explained to Fred Holz that in case he died the money would belong to defendant. The pass-book was given Fred Holz and remained with him until he died. No money was either deposited or withdrawn from the time the change in the pass-book was made until the death of Fred Holz.

If this deposit remained the sole property of Fred Holz, and the entry of defendant's name as a joint depositor was for convenience only, so that the money might be withdrawn by the son when the father, because of infirmity or death, could not do so, this action is well brought. But the trial court was of the opinion that the transaction at the bank amounted to a gift *inter vivos*, and, since the action was in conversion and not to set aside this gift as being void as to existing creditors of the donor, no recovery could be had. The appellant seems to concede, both in this court and in the court below, that there was an executed gift, but contends that, being voluntary and without consideration, it was void as against the claim allowed, since it existed when the gift was made. We must now assume that the court was justified in finding an executed gift of the deposit. The legal title thereto must then have passed to defendant.

In *McLeod v. Hennepin County Savings Bank*, 145 Minn. 299, 176 N. W. 987, a deposit to a joint account with right to the survivor was considered and the authorities collated. It was there held that the evidence sustained the finding of an executed gift. Had such finding here been challenged, the result might not have been the same, for the evidence here is much weaker, and tends rather to establish an attempt to make a testamentary gift than a gift *in praesenti*. In the case cited the question was not decided whether section 6390, G. S. 1913, affects

the rights between the joint owners of a deposit, or was solely to fix the rights as between the bank and the depositors. With the concession of appellant already referred to, we need not consider whether that statute bears on any question before us. Plaintiff was never in possession of the deposit, and, as between his intestate and defendant, there had been a lawful transfer of title under which the latter held possession. "The deed, even if fraudulent as to creditors, would be valid between the parties to it." *Thysell v. McDonald*, 134 Minn. 400, 159 N. W. 958, Ann. Cas. 1917C, 1015.

In that situation we think plaintiff, as representing the creditor of the intestate, could not sue defendant either in conversion or replevin, but must bring the action under section 7313, G. S. 1913, to set aside or annul the transfer and allege that it was made to defraud creditors or set out the ground upon which it is sought to be annulled. The complaint contains no averment of a gift of this deposit, nor any ground for setting it aside or that when made the decedent did not retain enough money to pay the claim in question.

Bennett v. Schuster, 24 Minn. 383, has been cited in *Cobbey, Replevin*, 72 (2d ed.) as holding that in cases like this replevin by the administrator will lie. However, an examination of the opinion as well as the syllabus will show that it does not so hold, but that the inference is to the contrary, for the decision was bottomed on the fact that, after the property had come into the lawful possession of the administrator, the defendant therein had subsequently taken it wrongfully. See also *Threlkel v. Scott*, 89 Cal. 351, 26 Pac. 879.

It cannot be said that the issue was litigated by consent, for all the evidence offered was properly admissible on the issue made by the pleadings, viz., conversion. No request was made to amend the complaint in the court below, and it would hardly be right for this court to order it done. It may be that defendant, in any event, might successfully defend as to the amount of the deposit that was used by him to defray funeral expenses.

As the situation was at the conclusion of the trial we think the court made all the findings required and no error was made in refusing to find upon issues not presented by the pleadings.

Judgment is affirmed.

H. A. DREVES COMPANY v. BAD AXE GRAIN COMPANY
AND OTHERS.

MERCHANTS NATIONAL BANK OF ST. PAUL, GARNISHEE,
SECOND NATIONAL BANK OF SAGINAW, MICHIGAN,
INTERVENER-APPELLANT.¹

June 10, 1921.

No. 22,289.

Garnishment — finding against intervener sustained.

Testimony considered and *held* sufficient to support a finding that the plaintiff was the owner of the fund in the possession of the garnishee and that intervener had no interest therein, and that the complaint in intervention be dismissed upon the merits.

Action in the district court for Ramsey county to recover \$6,308.84 upon a carload of beans. The Merchants National Bank of St. Paul was summoned as garnishee and disclosed in its hands \$2,810.60, which was claimed by the Second National Bank of Saginaw, Michigan, by its complaint in intervention. The case was tried before Hanft, J., who made findings and ordered judgment against defendant company for \$3,047.93. and that the sum of \$2,810.60, in the hands of the garnishee should be used in part payment of the judgment, dismissed the intervener's complaint in intervention upon the merits and with prejudice. From an order denying its motion to amend the findings, conclusions of law and order for judgment, intervener appealed. Affirmed.

Butler, Mitchell & Doherty, for appellant.

Stringer & Seymour, for respondent.

QUINN, J.

This is an appeal from an order of the district court of Ramsey

¹Reported in 183 N. W. 285.

county denying intervenor's motion for a new trial.

Plaintiff is a corporation engaged in handling food stuffs at St. Paul, Minnesota; defendant is a grain dealer at Bad Axe, Michigan, garnishee is a national bank at St. Paul, and the intervenor is a national bank at Saginaw, Michigan. In February, 1918, the defendant sold and later shipped from its place of business by rail to the plaintiff at St. Paul, a carload of beans. At the time of shipment defendant drew a draft upon plaintiff for \$7,810.60 to cover the purchase price of the beans, attached it to an order bill of lading, transferred the same to intervenor and received full credit therefor. The intervenor forwarded the same to the Merchants National Bank of St. Paul for collection in the usual course of business. When the car arrived at St. Paul plaintiff refused to accept the beans upon the ground that they were not according to contract. On May 6, Mr. Vye, the executive officer of the Federal Food Commission for the state of Minnesota, having learned that the car was standing upon track, requested plaintiff to unload the same so as to conserve the beans and release the car, assuming to act under the war powers conferred by the Lever Act. Plaintiff informed the officer that it refused to accept the beans or to unload the car, as the beans did not come up to the requirements of its contract. The officer then informed plaintiff that he would expect the plaintiff to comply with the request, pay the money into the bank, procure the bill of lading and unload the car, at the same time stating that the bank would hold the money until the controversy was adjusted. On the same day the officer wrote the bank that it was necessary to require the beans to be unloaded, saying: "You are also directed to hold the proceeds of this draft in your possession subject to our orders, pending a settlement and further disposition of the controversy." Plaintiff then paid the amount of the draft into the bank, obtained the bill of lading and took possession of the beans. Plaintiff's vice-president testified that: "I told him (the bank teller) that the food administration had ordered us to take this money to the bank and place it there on deposit so that we could secure the bill of lading and unload this car of beans, and that this amount of money was to be held until the controversy between ourselves and the Bad Axe Grain Company could be settled, and I further told him not to let any of the money get out

of the bank's hands unless he had our instructions." Plaintiff did not receive the draft. It remained with the bank and was not stamped "paid."

On May 14 plaintiff received notice from the food administration that it had received a letter from defendant requesting it to bring about a settlement, saying: "It is the policy of the food administration first and foremost to see that food products are conserved and gotten in to market as directly as possible, and not to settle legal disputes between parties. However, we are always willing to do what we can to bring about a settlement. To this end will you please immediately send to this office all documents, telegrams, letters and correspondence which took place between you and the Bad Axe Grain Co. relative to the sale and shipment of this car?" On May 24 plaintiff received from the administration a decision determining the controversy against it without a hearing. The administration then requested the bank to remit the money in its possession to the defendant. From such decision plaintiff appealed to Washington. Pending appeal the administration notified plaintiff that it had a request from the defendant that the beans be sold, and at the same time it directed plaintiff to dispose of the same. On July 19 it also directed the bank to remit to defendant \$5,000 of the funds in its hands, pursuant to an understanding with the plaintiff, which was done. The decision of the commission was affirmed in Washington, and on September 4 the department directed the bank to remit the balance of the funds to the defendant. The bank refused to comply with the request and the bringing of this action followed. Subsequently plaintiff disposed of the beans, receiving in gross therefor the sum of \$5,256.82.

This action was brought September 12, 1918, when the Merchants National Bank was summoned as garnishee and disclosed the sum of \$2,810.60 in its hands. Thereafter the Second National Bank of Saginaw, pursuant to an order of court, appeared and filed a complaint in intervention, claiming title to the fund so disclosed. The trial court, after trial, ordered judgment for plaintiff and against defendant in the sum of \$3,047.93, with interest, and that plaintiff is entitled to receive the \$2,810.60 held by the garnishee, in part payment of such judgment; that plaintiff was entitled to judgment against the

intervener; that the complaint in intervention be dismissed upon the merits with prejudice; that the intervener is not the owner of and has no right, title or interest in or to the \$2,810.60 in the hands of the garnishee; that it be forever barred and precluded from any interest therein, and that plaintiff recover its costs and disbursements against the intervener.

The issues upon this appeal were tried and submitted upon the pleadings and proofs of the plaintiff and intervener. No point is urged but that the intervener is the owner of the draft, and that it was transmitted to the garnishee for collection in the usual course of business. Plaintiff refused to pay the draft upon the ground that the beans were not according to contract. The money was turned over to the bank, not in payment of the draft, but to be held by the bank until the difference as to the quality of the beans was adjusted between the parties to the contract. This is the version of the situation found and adopted by the trial court, and it is well supported by the proofs in the case. The plaintiff had a right to name the conditions upon which it left the money with the bank. The bank was acting in no way for plaintiff. It was acting for intervener. It delivered the bill of lading upon receiving the money at the suggestion of the food commission. It retained the money until July 19, when \$5,000 was remitted to the intervener at the request of the food administration and with the consent of plaintiff. Intervener received and retained that money. It must have been familiar with the entire situation, as indicated by its letter of September 26. It requested the St. Paul bank to remit the balance pursuant to the direction of the food administration. The proofs amply sustain the findings of the trial court that the funds in the St. Paul bank were the property of plaintiff and not of the intervener, and that plaintiff was entitled thereto.

Affirmed.

J. B. HUME v. DULUTH & IRON RANGE RAILROAD
COMPANY, AND JOHN BARTON PAYNE,
AGENT OF THE PRESIDENT.¹

June 10, 1921.

No. 22,297.

Railway — safeguards at highway crossing — no question of negligence for jury.

1. The evidence stated in the opinion was not sufficient to warrant the submission to the jury of a charge of negligence on the part of a railroad company based on its failure to maintain a watchman, gates, automatic bells or other signals, at a highway crossing to warn travelers of the approach of trains. There is no hard and fast rule for determining whether there should be a submission of such a charge of negligence. The facts and circumstances of each case must be the guide to the trial courts in deciding upon the course to be followed.

Judgment notwithstanding verdict.

2. The evidence did not entitle appellants to judgment notwithstanding the verdict.

Action in the district court for St. Louis county to recover \$50,000 for injuries received while a passenger in an automobile bus and caused by the negligence of defendants' servants. The case was tried before Freeman, J., who when plaintiff rested denied the separate motions of the railway company, the director general of railroads, the transfer company and defendant Vidas to dismiss the action as to them, and at the close of the testimony denied the motion of defendant railway company, of the director general and of the Federal agent for a directed verdict in their favor, and a similar motion in behalf of the other defendants. The court directed a verdict against the transfer company and Vidas, and a jury which returned a verdict against all the defendants, fixed the damages at \$12,000, and answered in the negative the special question set out in the second paragraph of the opinion.

¹Reported in 183 N. W. 288.

From an order denying their motion for judgment notwithstanding the verdict or for a new trial. the railroad company and the agent of the President appealed. Reversed and a new trial granted.

Howard T. Abbott for Abbott, MacPherran, Gilbert & Doan, for appellants.

Boyle & Montague, for respondent.

LEES, C.

Plaintiff, a passenger in an autobus of the Biwabik Transfer Company, driven by Vinco Vidas, was injured on February 13, 1919, at about 7 o'clock in the evening, when the bus was struck by appellants' train at a highway crossing. The complaint charged that the collision was due to the negligence of Vidas and the transfer company in operating the bus and of the railroad company in operating its train. As to the latter, one of the charges of negligence was the failure to have, at the crossing, a watchman, gates, an automatic bell or other signal, to give warning of approaching trains.

The court denied appellants' request for a directed verdict, instructed the jury to return a verdict against the transfer company and Vidas, and submitted the following special question: "Did the driver of the bus actually see the approaching train in time to have avoided the collision by the use of reasonable care?" The jury answered "no" and returned a general verdict in plaintiff's favor for \$12,000. The railroad company and the agent of the President have appealed from an order denying either judgment notwithstanding the verdict or a new trial.

At the crossing the railroad runs substantially east and west and the highway northeasterly and southwesterly. From a point about 1,000 feet west of the crossing the railroad and highway gradually come nearer together until just before the crossing is reached. At that point the highway bends and passes over the track on an upgrade beginning about 85 feet from the rails. At the time of the collision the bus was going east and the train west. The railroad track is laid on a road-bed slightly higher than the highway. A traveler on the highway from the west has a clear view of the railroad for at least 500 feet before reaching the crossing, and for 900 or 1,000 feet more to the east of the crossing. A mine called the Elba is located north of the railroad, east

of the highway, and not far from the crossing. There are a number of switch tracks leading to the mine. Most of them leave the main track east of the crossing. West of the crossing there is a small building used as a station. At the time of the collision there was snow on the ground and the surface of the highway was slippery and had ruts in it. The train consisted of an engine and two coaches. The engine was equipped with an electric headlight and the coaches were lighted. The train approached the crossing on an upgrade and was running on time and at a speed of from 15 to 20 miles an hour. The bus had electric headlights and was lit up inside by electricity. The upper portion of the body of the bus, on all sides, was of glass. The driver sat inside, but could see in every direction. The bus approached the crossing at a speed of about 15 miles an hour. When it reached a point 500 or 600 feet away, the speed was gradually reduced to 5 or 6 miles an hour.

Vidas was familiar with the crossing. He testified he saw the train and intended to bring the bus to a stop when within 35 or 40 feet of the track. When he reached that point, he applied the foot brake and then the emergency brake, but the bus did not stop. He testified that the icy ruts in the road caused the wheels to slide or skid up to the track, and immediately the collision took place. The evidence does not show to a certainty where the train was when Vidas first saw it. It is conceded that the whistle was blown for the crossing. The evidence is conflicting as to whether the engine bell was rung from the whistling post to the crossing. There is considerable travel over the highway. Several hundred people live at the Elba location. Photographs of the crossing and the adjacent territory show that there are no buildings, stock pens, piles of building or other materials, trees, brush or other obstructions to the view of the crossing or the railroad track.

When the evidence was closed, appellants' counsel, after their motion for a directed verdict had been argued and denied, made this statement to the court: "We * * * respectfully object to the court submitting to the jury the question of the absence of a flagman or of an automatic gong, or of safety gates, as the court indicated he believed it advisable so to do."

In charging the jury, the court said that negligence was the basis of plaintiff's cause of action, and, unless the jury found that the railroad company was negligent in one or more of the respects charged, there could be no recovery. Then there was a statement of the negligence with which the company was charged, including its failure to maintain a watchman, gates, automatic bells or other signals at the crossing, followed by this instruction: "In this connection you have a right to take into consideration the condition of the crossing and of the road approaching the crossing, its location in reference to the Elba location and the amount of traffic that might commonly be expected to pass over said road. * * * After taking all those things into consideration, you are to say whether it was negligence on the part of the railroad company to fail and neglect to provide a watchman at said crossing or to provide suitable crossing gates, automatic bells or other signals to warn pedestrians or persons in vehicles using said highway."

Appellants insist that this was prejudicial error.

The court's views on the subject have been heretofore expressed. *Lawler v. Minneapolis, St. P. & S. S. M. Ry. Co.* 129 Minn. 506, 152 N. W. 882; *Zenner v. Great Northern Ry. Co.* 135 Minn. 37, 159 N. W. 1087; and *Gowan v. McAdoo*, 143 Minn. 227, 173 N. W. 440. In the *Lawler* case, it was held that the failure to maintain a flagman, gates or a signal bell at railroad crossings was an element to be considered in determining whether a railroad company was negligent in running a train through a village of 700 people at a speed of between 50 and 60 miles an hour. In the *Zenner* case, the court sustained the submission of the question whether ordinary care required the maintenance at a crossing of extra precautions to warn travelers of the approach of trains. In that case a train could not be seen until a traveler was within 40 feet of the track and the crossing was the busiest in the city of St. Cloud. In the *Gowan* case, the traveler's view of an approaching train was obstructed; the crossing was in a village through which trains were run without a stop, the speed varying from 40 to 60 miles an hour. The submission of the question under consideration was sustained in view of the location of the crossing, the surrounding conditions, and the speed at which trains were regularly run over it.

In the *Zenner* case, it was expressly stated that whether extra precau-

tions might be required at country road crossings to give warning of the approach of trains, was a question not presented by the record. Appellants assert that it is presented in the present case and must be decided. Manifestly it would be absurd to say that the right of a plaintiff, injured at a railroad crossing, to go to the jury with this question depends wholly on whether the crossing is in the country or in a city or village. The facts and circumstances in each case must be the guide in determining whether there is a fair question about which reasonable men might differ. It may be said this leaves the question up in the air, but that may also be said of many other established rules of the law of negligence.

Everybody will agree that, in the case of a railroad crossing over a little-traveled road on a western prairie where a train may be seen for miles, no reasonable man, sitting as a juror, could find negligence from the failure to maintain a flagman, gates or an automatic bell. Equally unanimous would be the contrary opinion where a railroad crosses at grade a busy street in the heart of a populous city. The two extremes used for illustration are as far apart as day and night. Midway between, there are cases which come so near the border line it is hard to know on which side they lie. As at the twilight hour, it is not easy to say with certainty when day has ended and night begun, so it is with such cases. We attempt to state no hard and fast rule, for there can be no absolute criterion. We merely hold that it is for the trial court to say in the first instance whether the evidence is such as to make a railroad company's failure to maintain extra warning precautions at a particular crossing a proper subject for the consideration of the jury in determining whether the company was negligent. We should have to go farther than we did in the Gowan case to hold that the jury might properly consider it in the instant case. Two of the important features of that case are absent here, namely, the obstructions to the traveler's view and the high speed at which trains were regularly run through the village and over the crossing. We are not inclined to extend the doctrine of the Gowan case.

We are of the opinion that the facts here would not support a finding of negligence based on appellants' failure to maintain at this crossing either a flagman, gates, automatic bells or other signals not requir-

ed by statute. This conclusion necessitates a new trial, but, of course, it does not entitle appellants to judgment notwithstanding the verdict. There was some evidence to sustain plaintiff's other charges of negligence.

Appellants insist that the uncontradicted testimony of Vidas that he saw the train coming and intended to stop to let it pass is conclusive on the question of whether the negligence charged was a proximate cause of plaintiff's injury. Stated otherwise, the proposition is that, if Vidas saw the train in time to stop for it and intended to do so, the failure to give warning signals of its approach or to keep a vigilant lookout for travelers nearing the crossing had nothing to do with the accident, because the sole cause for it would be Vidas' negligence in driving too near the track before he tried to stop. There is much force in this contention, but its validity rests on the assumption that Vidas actually saw the train before he tried to stop. There was evidence of statements to the contrary made by him immediately after the accident. There was also testimony by eye-witnesses of the accident as to the movements of the bus as it came up to the crossing, from which it might be inferred that Vidas did not see the train or he would not have proceeded as he did. We think the jury might have concluded that his testimony as to this phase of the case should not be credited. If it is eliminated, there is enough left to make it improper for this court to say that the evidence is conclusive against the verdict or that defects in it may not be supplied on a new trial. *National Cash Register Co. v. Merrigan*, 148 Minn. 270, 181 N. W. 585; *Kjerkerud v. Minneapolis, St. P. & S. S. M. Ry. Co.* 148 Minn. 325, 181 N. W. 843.

The order is reversed and a new trial granted.

FRANK A. MULLEN v. JOHN H. DEVENNEY.¹

June 17, 1921.

No. 22,152.

Alienation of affection — evidence need not be pleaded.

1. The arts used and acts done by defendant in alienating the affections of plaintiff's wife, are matters of evidence which need not be pleaded.

Charge to jury.

2. If pleaded and some are not proved, the court is not required to instruct the jury that there is no evidence that defendant was guilty of those not proved, even though plaintiff's counsel read the complaint to the jury in making his opening statement. *Bowers v. Chicago, M. & St. P. Ry. Co.* 141 Minn. 385, distinguished.

Same.

3. The charge to the jury definitely limited them to the consideration of defendant's conduct as shown by the evidence, and correctly stated the ultimate facts which plaintiff must establish to make out a case.

Refusal to give requested instruction.

4. There was no error in the court's refusal to give the instruction requested by defendant.

Objection to improper argument should be prompt.

5. If counsel for one of the parties makes an improper statement in his closing argument to the jury, prompt objection should be made, in order that there may be an opportunity to correct its prejudicial effect by appropriate action at the time.

New trial because of such misconduct.

6. The granting of a new trial for such misconduct rests largely within the discretion of the trial court, and its action will not be reversed except for an abuse thereof. It was not abused in the denial of a new trial for the alleged misconduct of plaintiff's counsel in the particulars set out in the opinion.

¹Reported in 182 N. W. 350.

After the former appeal reported in 136 Minn. 343, 162 N. W. 448, the case was tried before Converse, judge of the First judicial district, who when plaintiff rested denied defendant's motion to dismiss the action and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$23,500. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Davis & Michel, T. J. Mangan and Royal A. Stone, for appellant.

John Kain, A. G. Divet and W. E. Purcell, for respondent.

LEES, C.

This is an action for damages for the alienation by defendant of the affections of plaintiff's wife. It made its first appearance here in 1917 on an appeal from an order striking out a portion of the answer. *Mullen v. Devenney*, 136 Minn. 343, 162 N. W. 448. Plaintiff's wife had theretofore obtained a divorce from him and that case has also been here. *Mullen v. Mullen*, 135 Minn. 179, 160 N. W. 494. There were three trials of the present action in the court below. The first resulted in a verdict for plaintiff for \$40,000, which was set aside as excessive. At the second, the jury disagreed, and at the third and last, plaintiff secured a verdict for \$23,500. Defendant appeals from a denial of a new trial.

The record is bulky and the briefs extended, but the questions presented for decision are few and comparatively simple. They center around alleged error in two respects: The refusal to give defendant's requested instructions, and misconduct of plaintiff's counsel not properly corrected by the court.

1. In addition to allegations of the ultimate facts which must be proved to maintain an action for the alienation of a wife's affections, the complaint set forth in detail the several acts done and the arts used to accomplish the alienation. These were properly matters of evidence by which plaintiff proposed to prove the ultimate facts and they might have been omitted from the pleadings. *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492; *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L.R.A. 387; note to *Burch v. Goodson*, Ann. Cas. 1912C, p. 1181; 21 Cyc. 1623; 13 R. C. L. § 512, p. 1463.

In making his opening statement, plaintiff's counsel read the pleadings to the jury. Defendant requested special instructions covering each act charged in the complaint to the effect that the evidence failed to show that defendant had been guilty of any such acts. The requests were denied and defendant urges, upon the authority of *Bowers v. Chicago, M. & St. P. Ry. Co.* 141 Minn. 385, 170 N. W. 226, that this was prejudicial error. The court's instructions were that

"The plaintiff's charge against the defendant, so far as I shall submit it to you, is as follows: That * * * the defendant * * * did wickedly and maliciously plan and contrive to, and enter upon the undertaking of obtaining for himself the love and affection of the said Anna Mullen, thus alienating and destroying her affections for the plaintiff, and teaching her to dislike and become dissatisfied with him and with her surroundings in said home, and to induce her to yield herself to his sexual embrace, and to thus break up and destroy the home of the plaintiff, and deprive him of the comfort of his said home and the love, affection and society of his said wife. That is the charge which the plaintiff makes as to the intention of the defendant for the acts which he subsequently charges the defendant did, as much as what the defendant actually did.

"The plaintiff further charges that in furtherance of such purpose and undertaking, the defendant did * * * approach and attend upon the said Anna Mullen with all the ordinary attentions, acts, wiles, and blandishments of a lover, and to ply her with compliments and flattery, and that he has thereby secured for himself the love and affection of said Anna Mullen, and has deprived the plaintiff of such love and affection. * * *

"This charge is all denied by the defendant, and in addition to denying the charge, the defendant alleges that if the plaintiff has lost the love and affection of his former wife, Anna Mullen, it is because of his drunkenness, and of his cruel and inhuman treatment of her and not because of anything this defendant may have done. * * *

"Now, those claims of the plaintiff on the one hand and of the defendant on the other hand, constitute the disputed questions of fact, gentlemen, which it is your province to determine."

There was a further instruction that before plaintiff could recover he

must establish three facts: First: The possession in the first instance of his wife's affections. Second: The loss or partial loss of them. Third: That such loss was caused by defendant's conduct "in one or more of the following particulars, as charged by plaintiff, that is, by his wrongful conduct in approaching and attending upon the said Anna Mullen with the ordinary attentions, acts, wiles, and blandishments of a lover, or by plying her with compliments and flattery, or by both of said methods," and that if plaintiff had failed to establish any one of these three facts, the verdict must be against him.

In the Bowers case three separate claims of negligence were pleaded, to which the court referred in charging the jury. There was no evidence to sustain two of them. Mr. Justice Holt said: "Stating all the claims without regard to the proof, and stating one issue involving acts not directly charged as negligence in the complaint, tended to confuse and becloud the single issue made by the evidence. * * * In view of the fact that the court had stated to the jury all the claims of negligence made in the complaint, we think defendant was entitled to the specific instructions requested withdrawing from consideration those as to which there was no proof whatever."

In the case at bar, but one ground for recovery is pleaded, namely, the alienation of the wife's affection. All other allegations of the complaint are of evidential as distinguished from the ultimate facts which are the foundation of plaintiff's right of action. In the Bowers case, negligence in one or more of the respects alleged was the ultimate fact to be established. The court did not limit the jury to a consideration of the one ultimate fact alleged which there was evidence to establish. But here the jury was definitely limited to consideration of conduct of defendant of which there was evidence. In this connection *Korby v. Chesser*, 98 Minn. 509, 108 N. W. 520, is in point.

Jurors are presumed to know the difference between accusations and proof. We doubt that a lasting impression is made on their minds by hearing pleadings read. They are more interested in what they hear from the witnesses and the court. At the close of a prolonged trial like this, filled with incidents of lively interest to the spectators, their recollection of what was read to them at the outset was apt to be dim. To have taken up each unfounded charge in the complaint and to have

stated that it was not supported by the evidence would have revived their recollection of such charges and diverted their attention from the live issues in the case. More harm than good will ordinarily be done by following this course. The practice of reading the pleadings in making the opening statement to the jury is not uncommon, but is not to be commended. Pleadings frequently abound in over-statements of fact and are usually couched in language unfamiliar to the average juror. The better practice is to state the issues in simple terms, and the evidence which the parties propose to offer in support of their respective contentions. See *Korby v. Chesser*, *supra*; *Savino v. Griffin Wheel Co.* 118 Minn. 290, 136 N. W. 876.

2. The court was requested but refused to instruct the jury that sexual relations between defendant and plaintiff's wife must be proved by the same amount and nature of evidence as a charge of adultery in a divorce action, and that there was no direct evidence of such relations. There was no error in this. The instruction, if given, would leave the jury in the dark as to the degree of proof required to establish a charge of adultery. The jury knew, without being told, that there was no direct proof of adultery, and presumably they also knew that there rarely is such proof.

3. Questions were put to one of defendant's witnesses to lay a foundation for his impeachment by the testimony of plaintiff. Plaintiff was not called to contradict the answers given. Defendant asked for an instruction that the jury had the right to infer bad faith from the asking of the questions without subsequently calling plaintiff to contradict the witness. The good faith of plaintiff or his counsel was not an issue for the jury. True, it is improper to put questions to an adverse witness ostensibly to lay a foundation for impeachment, but with no intention of following it up. If it appears that this has been done, the court may properly instruct the jury that they have no right to infer that the facts are as stated in the questions or that the witness' answers were untrue. No such instruction was requested. We find no error in the refusal to give the instruction which was requested.

4. To raise the point that counsel for the prevailing party was guilty of prejudicial misconduct in his argument to the jury, objection should be made and the court's attention called to the statement so there

may be an opportunity to correct its prejudicial effect by appropriate action at the time. *State v. Frelinghuysen*, 43 Minn. 265, 45 N. W. 432; *Langdon v. Minneapolis Street Ry. Co.* 120 Minn. 6, 138 N. W. 790; *Wadman v. Trout Lake Lbr. Co.* 130 Minn. 80, 153 N. W. 269. The trial court is best able to determine the effect upon the jury of the remarks of counsel. The granting of a new trial on this ground is very largely a matter within its discretion and its action will not be reversed except for an abuse thereof. *Smith v. Great Northern Ry. Co.* 133 Minn. 192, 158 N. W. 46; *Wrabek v. Suchomel*, 145 Minn. 468, 177 N. W. 764.

We dispose of the remaining assignments of error with these rules in mind.

In his argument to the jury, one of defendant's counsel said: "We want to stay within the record. Why does Mr. Murphy say 'there isn't a court in the land but what would grant you a divorce?'" In the closing argument, opposing counsel replied: "But she didn't have any ground for divorce. There wasn't any showing of it. If there was any complaint at all, it was the complaint that her husband stayed home too much."

Defendant requested an instruction that there was no evidence that the divorce was secured by means of false or perjured testimony. The instruction was not given, but the court did tell the jury they were in no way concerned with the rightfulness or wrongfulness of the decree of divorce. It is contended that, in view of the statements made in the argument, the requested instruction should have been given and that the ground was not properly covered by what the jury were told. We do not sustain the contention.

The remark of defendant's counsel first introduced the subject, which was wholly collateral to the issue on trial. The court correctly charged the jury they had nothing to do with the divorce proceedings. Moreover, if the remark was improper, it does not appear that any objection was made to it.

One of defendant's witnesses was asked, on cross-examination, whether plaintiff's counsel had not said to her that she knew more than she had told when a witness at the previous trial and that she need not be afraid to tell all she knew. The question was objected to as suggestive.

Addressing defendant's counsel, plaintiff's counsel said: "You are attempting to leave the impression with the jury that we were attempting to get this girl to testify to something that is untrue. We desire to say that the protection that was sought for her was that some of the emissaries of this defendant went to this little girl and threatened her in regard to her giving evidence in this lawsuit, and when she disclosed that to me I did say to her not to be afraid to tell the truth." Objection was made and the court instructed the jury to ignore the remark. Defendant's counsel then asked the witness who had threatened her, and she gave the name of one of defendant's witnesses. We think defendant has no cause to complain of this incident.

When plaintiff's wife was on the witness stand she was asked about a trip she had made to the Pacific coast accompanied by a young woman. She was asked where her companion obtained the money for the trip, and answered that it was furnished by a friend of the young woman's mother. Asked who the friend was, she gave the name of one of plaintiff's counsel. The gentleman whose name was given turned to defendant's counsel and said: "Tom, shake hands! I have got to hand it to you. This is one of the best things I have ever seen put over in a court of justice." This led to a retort, and finally plaintiff's counsel said: "This statement of counsel is an absolute falsehood and a lie." At this point the record abounds in objections, exceptions and requests for action by the court. The court said: "This must stop. Now, gentlemen, this has gone far enough. * * * We will drop it and go on." Then, referring to what had been said by plaintiff's counsel: "It was an improper statement to be made, and is excused only by the unusual circumstances preceding, and I think improper statements were made on both sides by each counsel. I will instruct the jury * * * to forget entirely, so far as this case is concerned, the little incident which has occurred here this afternoon." We are of the opinion that the incident was properly dealt with and that there is no occasion for complaint of the treatment either side received at the court's hands. A little later, plaintiff's wife reiterated the statement that had aroused the ire of plaintiff's counsel, who, addressing the court, said: "I object to this hysterical talk because it is all untrue." In his argument to the jury, referring to this incident, he said: "If

there is anything in this lawsuit that shows this is a trumped-up defense, it is just that there." It is urged that this was prejudicial misconduct. The trial court was not of that opinion and we are not inclined to disturb its conclusion.

The remaining charges of misconduct, as well as some of those already discussed, must be considered in the light of the following addition to the proposed case, made at the direction of the trial judge. In substance it is this: That in the argument to the jury defendant's counsel violently denounced plaintiff and his witnesses as perjurers, referred to his counsel contemptuously, and naturally provoked retaliatory remarks; that many of the excerpts from the argument of plaintiff's counsel refer and were in answer to improper argument of defendant's counsel; that the interruptions of defendant's counsel apparently were intended to prevent an orderly argument; that the court put a stop to them and informed defendant's counsel that they might have the entire argument taken by the court reporter and take exceptions to improper statements after the argument closed; that counsel did not have the entire argument taken, but sat by the reporter and directed him to take parts and not to take other parts of it, and that only a partial record was made, which is so disconnected as not to present the argument fairly; that no part of the argument, taken in its setting and context, seemed to the court to go beyond what was permissible, measured by the record and the argument of defendant's counsel it was intended to answer.

In view of this statement, defendant has no solid ground upon which to found his remaining charges of prejudicial misconduct. Nevertheless we have considered each of them. It would serve no useful purpose to set out or express approval or disapproval of the fragmentary remarks of counsel appearing in the record. We do not know the connection in which the remarks were made. They may have been pertinent as a reply to something said by defendant's counsel. The trial court's statement indicates that they were. We cannot assume that there was neither occasion nor justification for them. We cannot view the whole situation from the vantage ground of the trial court. We, therefore, decline to override its conclusions.

Finding no error in the record of which defendant may justly complain, the order denying a new trial is affirmed.

CONFER BROTHERS, INC. v. J. A. COLBRATH.¹

June 17, 1921.

No. 22,231.

Broker — sale by owner — action for commission.

In consideration of plaintiff's efforts to sell certain real estate, defendant gave plaintiff the exclusive right to sell it for a period of 30 days, and agreed to pay plaintiff a specified commission upon any sale made while the contract remained in force, whether made by plaintiff or defendant. Plaintiff accepted the employment by advertising the property and taking prospective purchasers to examine it. Defendant sold the property himself within 30 days. *Held* that plaintiff was entitled to recover the stipulated commission.

Action in the municipal court of Minneapolis to recover \$320 commission upon the sale of real estate. The answer alleged that the agreement with plaintiff was not effective until September 11, 1919. The case was tried before Montgomery, J., and a jury which returned a verdict for \$312.50. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

L. O. Rue, for appellant.

Eugene S. Bibb, for respondent.

TAYLOR, C.

Plaintiff is a corporation engaged in the business of selling real estate on commission and is located in the city of Minneapolis. On September 4, 1919, defendant executed to plaintiff an instrument which so far as here important is as follows:

"To Confer Bros. Members of Minneapolis Real Estate Board:

"In consideration of your agreement to list in your office the real estate described on the reverse side of this card, and of your efforts to find a purchaser for the same, I hereby grant to you the exclusive right

¹Reported in 183 N. W. 524.

to sell or to contract to sell said real estate within a period of thirty days from the date hereof * * * and for your services I hereby agree to pay you the regular Minneapolis Real Estate Board commission * * * upon any sale or contract for the sale of said real estate while this agreement remains in force, whether such sale be made by yourself or by myself * * *

"J. A. Colbrath

"Owner.

"Accepted E. E. Bell

"Members Minneapolis Real Estate Board."

Three days later defendant sold the property himself without any aid from plaintiff. Plaintiff sued for the stipulated commission, the court directed a verdict therefor, and defendant appeals from an order denying a new trial.

Defendant contends that the contract was unilateral and without consideration, and that plaintiff had neither accepted it nor assumed any obligations under it and cannot recover for that reason. The contract does not purport to have been accepted by plaintiff, but by E. E. Bell. Bell was the employe of plaintiff with whom defendant transacted the business, but no attempt was made to show that he was an officer of the corporation or had any authority to make contracts in its behalf, and he did not purport to sign the acceptance in its behalf. However, the undisputed evidence shows that plaintiff had had a photograph made of the house for use in a display advertisement and had ordered the advertisement published, and had taken at least two prospective purchasers to examine the property within the three days that elapsed before the sale. This was sufficient to show an acceptance of the employment within the doctrine of *Lapham v. Flint*, 86 Minn. 376, 90 N. W. 780, conceding that the acceptance by Bell was ineffective.

Defendant claims that, by the terms of the contract, plaintiff was entitled to compensation only in case the sale was made by plaintiff or by defendant, and that the sale was not made by either, but by defendant's wife who owned the property. Plaintiff, in its complaint, alleged that defendant sold the property, and defendant, in his answer, alleged that he made the sale through his own efforts without aid from plaintiff, so the fact that he made the sale stands admitted. We find

no error in the ruling that as defendant had made the contract as owner of the property and plaintiff had acted on that theory, evidence tending to show that the property did not belong to defendant, but to his wife, was not material.

The cases cited by defendant in respect to the measure of damages where a party who has undertaken to perform an executory contract is prevented from doing so by the other party, are not in point. Defendant agreed to pay a specified commission in the event of a sale. The sale was made, plaintiff brought suit on the contract for the stipulated amount, and, if entitled to recover at all, was entitled to recover that amount.

Order affirmed.

QUINN-SHEPHERDSON COMPANY v. UNITED STATES
FIDELITY & GUARANTY COMPANY AND OTHERS.

UNITED STATES FIDELITY & GUARANTY COMPANY,
APPELLANT.¹

June 17, 1921.

No. 22,245.

New trial — reversal on appeal — second trial.

1. The reversal of an order denying a new trial leaves the case where it stood before it was brought to trial. The second trial is not controlled by the evidence or proceedings at the first.

Oral contract of insurance — submission of issue to jury.

2. The evidence required the submission to the jury of an issue as to the existence of an alleged oral contract of insurance of the fidelity of plaintiff's employes, and supports the jury's findings that the parties had entered into such a contract.

Letter not inconsistent with existence of contract.

3. The contents of the letter set out in the report of this case on the former appeal (142 Minn. 428, 431), are not inconsistent with an infer-

¹Reported in 183 N. W. 347.

ence that at some time before it was written the parties had arrived at an agreement for insurance.

Defense not made in trial court barred on appeal.

4. The defense that plaintiff had made false answers to questions in the application for insurance was not urged at the trial and cannot be considered for the first time on this appeal.

Charge to jury.

5. The trial court did not give undue prominence in its instruction to the jury to the letter to which reference has been made.

After the former appeal reported in 142 Minn. 428, 172 N. W. 693, the case was tried before Fish, J., who at the close of the testimony denied defendant company's motion for a directed verdict, and a jury which returned a verdict for \$24,372.18. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant company appealed. Affirmed.

Cobb, Wheelwright & Benson, for appellant.

Fowler, Carlson, Furber & Johnson, for respondent.

LEES, C.

This case is brought here a second time by the guaranty company's appeal from a denial of its alternative motion for judgment or a new trial after a jury had returned a verdict for plaintiff. The facts are fully stated in the opinion rendered on the former appeal. 142 Minn. 428, 172 N. W. 693. A reversal is sought on three grounds: (1) That the evidence is the same as at the first trial, and the law of the case, as stated in the opinion on the former appeal, entitled defendants to a directed verdict; (2) that there was no evidence that an oral contract of insurance of the fidelity of plaintiff's employes was ever made; (3) errors in the court's charge to the jury.

1. The evidence received at both trials was substantially the same. The first trial resulted in a finding that no contract for insurance had been made. After reviewing the evidence, this court said it satisfactorily sustained the finding. There was no intimation that it would not have sustained a contrary finding. If the court had been of the opinion that the evidence conclusively showed that no contract had

been made, a new trial would not have been granted. The order was unconditionally reversed. The effect of the reversal was to leave the case where it stood before it was brought to trial. The evidence and proceedings at the first trial were wiped out and the second was controlled in no respect by the first. *St. Anthony Falls Bank v. Graham*, 67 Minn. 318, 69 N. W. 1077; *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497; *Holm v. Great Northern Ry. Co.* 139 Minn. 258, 166 N. W. 224.

2. Appellant's principal contention is that the evidence of the making of an oral contract of fidelity insurance was not sufficient to justify the submission of that issue to the jury, or to support a verdict for plaintiff based on the existence of such contract. Nothing can be added to the outline of the evidence prepared by Mr. Justice Dibell when the case was here before. Appellant urges that the subsequent proceedings conclusively show that Wilson's version of the conversation with Shepherdson and Warner is correct. In support of its position, eleven reasons of varying degrees of cogency are stated and discussed in its brief. Respondent advances five reasons why appellant's deductions from the evidence are inconclusive or unsound, and confidently asserts that the weight of the evidence required the jury to find as it did. The opposing contentions of the parties have been thoroughly and clearly presented for our consideration. The fact that there is an irreconcilable difference in the conclusions honestly reached by experienced counsel in analyzing the evidence, tends to demonstrate the propriety of submitting the issue of contract or no contract to the jury. We hold that it was properly submitted and that the evidence was sufficient to justify the jury in finding in plaintiff's favor on that issue.

3. The appellant asserts that the Murphy letter of October 3 is neither a binder nor a contract for insurance. Plaintiff does not seriously dispute the assertion, contending, however, that the letter is an unqualified acceptance of a previous proposal for insurance and an admission of the existence of an oral contract of insurance when the letter was written. Conceding that appellant's assertion is correct, it does not follow that plaintiff must fail. The evidence would support a finding that the terms of a present contract were agreed upon either at the first conversation of the representatives of the parties or in the

course of subsequent negotiations. The contents of the letter are not inconsistent with an inference that at some time before it was written the parties had arrived at such an agreement.

4. Attention is called to what are termed suspicious circumstances surrounding the part played by plaintiff throughout the entire transaction. The suggestion is made that Rauch was a defaulter prior to August, 1916; that Shepherdson knew it when he and Warner had the conversation with Wilson; that in September Rauch became still more deeply involved, and that Shepherdson's anxiety to get written evidence of insurance effective as of August 1 was due to his knowledge of the true situation, which was concealed from appellant's representatives. Much is made of the circumstance that in November, 1916, plaintiff brought an action against Rauch and his wife to have a lien impressed on certain Minneapolis real estate alleged to have been purchased by Rauch with funds stolen from plaintiff prior to August 1. One of the defenses interposed in the present action was that, if Rauch was a defaulter, plaintiff knew it when it answered certain interrogatories in the written application for insurance; that its answers were false, and hence appellant was absolved from liability if, in fact, there was a contract insuring Rauch's fidelity.

In submitting the case to the jury, the court said: "Practically the one question in the case for you to determine is: Was this contract made?" Referring to the action against Rauch, the court said that evidence relating to it had not been received to diminish the recovery against defendant. No exception was taken to this. No request was made for the submission of the special defense of falsity in plaintiff's answers to questions in the application for insurance. For these reasons this defense cannot be considered for the first time on this appeal.

5. The final contention is that undue prominence was given to the Murphy letter in the court's charge to the jury. After reading the letter, the court said: "There has been no question as to the right or authority of Mr. Wilson or Mr. Murphy to act for the defendant. * * * For that reason this letter is important as bearing upon the question as to whether Mr. Murphy and Mr. Wilson, or either or both of them, had actually agreed with Quinn-Shepherdson Company, to

cover any loss they might have sustained under this proposed insurance."

The attention of the jury was also called to the fact that before the letter was written appellant had been furnished with a list of plaintiff's employes, and had delivered blank applications to plaintiff which had been filled out by it and its employes and returned to appellant. In giving this instruction, the court is said to have committed prejudicial error under the doctrine laid down in *State v. Yates*, 99 Minn. 461, 109 N. W. 1070; *Kincaid v. Jungkuz*, 109 Minn. 400, 123 N. W. 1082; *Geddes v. Van Rhee*, 126 Minn. 517, 148 N. W. 549. In those cases, the vice in the instructions consisted in singling out and particularly directing the jury's attention to a circumstance, or testimony, or a written instrument, which was favorable to the party who recovered the verdict. In the instant case the letter was an important piece of evidence. Whether it was favorable or unfavorable to appellant is not so clear. It is quite possible to build upon it a plausible argument in favor of either party's contention respecting the main issue in the case. We doubt the application of the cases cited to the facts in the present case.

There is an additional reason why appellant has no just cause to complain of the instructions in question. What was said about the *Murphy* letter should be considered in connection with what preceded and followed in the court's charge. The jury were told that ordinarily a written agreement is entered into where insurance is effected; that the evidence in support of plaintiff's claim of an oral contract should be clear and convincing; that the real conflict was confined to a definite point, namely, as to what occurred at the first meeting in *Wilson's* office on August 2 or 3, and that, if both parties understood there was an agreement and there was no reason to doubt that there was an understanding that plaintiff's employes were covered by insurance, then and only then could a verdict be returned in plaintiff's favor. The court clearly stated to the jury the vital issue in the case. Its charge respecting the degree of proof required to establish plaintiff's claim was fully as favorable to appellant as it had a right to anticipate. When taken in connection with the remainder of the charge, the reference

to the importance of the Murphy letter was not an infraction of the rule relied on by appellant.

Our examination of the record has convinced us that appellant had a fair trial; that the only important question in the case was one of pure fact; and that the jury's determination of the question, approved by the learned trial judge, should be upheld as final.

Order affirmed.

FARMERS STATE BANK OF COLOGNE v. THOMAS J.
SKELLET.¹

June 17, 1921.

No. 22,256.

Renewal note — good faith of holder — charge to jury.

A note given in renewal of a valid note is good in the hands of an assignee of the payee, without proof of his good faith, though when the payee took the renewal he promised the maker that he would place it as collateral to a loan then contemplated and would not otherwise negotiate it, and, failing to procure such loan, negotiated it in violation of his promise.

Action in the district court for Ramsey county to recover \$312.50 on a promissory note. The facts will be found in the opinion. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict for \$356.45. From an order denying his motion for a new trial, defendant appealed. Affirmed.

George T. Simpson and *John F. Dahl*, for appellant.

Murphy, Bradford & Cummins, for respondent.

DIBELL, J.

Action on a promissory note. There was a verdict for the plaintiff. The defendant appeals from the order denying his motion for a new trial.

¹Reported in 183 N. W. 831.

The note dated June 14, 1918, was made by the defendant to W. H. Schafer and was indorsed by him and was purchased by the plaintiff. The defense, and there was evidence to support it, was that the note was given as an accommodation; that it was to be used by Schafer as collateral to a loan which he was negotiating at Chicago for the promotion of a corporation in which he and the defendant and others were interested; that it was not to be used otherwise, and that contrary to the agreement, and upon Schafer failing to get the loan, it was negotiated to the plaintiff. This was the defense specifically pleaded and the only defense made. If the facts were as pleaded, the note was negotiated in fraud and the title of Schafer was defective within the Negotiable Instruments Act. G. S. 1913, § 5867, and in such event the defense was good within *McWethy v. Norby*, 143 Minn. 386, 173 N. W. 803, and cases cited.

There was evidence that the note, along with others, was given in renewal of a note or notes, valid so far as appears, made by the defendant to Schafer in March, 1918. This was the claim of the plaintiff. The claim of the plaintiff and that of the defendant were necessarily hostile. Both could not be true.

The court submitted both theories to the jury. It charged, relative to the claim of the plaintiff, that if the note in suit was a renewal of a former note given by the defendant to Schafer, which as we have said was apparently valid, then it was given upon a valuable consideration and the defense claimed by the defendant was not made out. The only error claimed is in this charge.

The charge was correct. If the note was a renewal, it had a real inception when made and delivered, was supported by a consideration, and was unlike the accommodation note in *McWethy v. Norby*, which was without vitality until negotiated by the payee; and a promise by the payee in the case at bar that he would use it as collateral to a specific obligation and would not negotiate it elsewhere, would be no defense. If it was an actual obligation, owing from the defendant to the plaintiff, he could use it as he pleased. If he did not negotiate it he could recover upon it, and if he negotiated it his assignee could recover.

Whether the plaintiff was a bona fide purchaser was an issue. The

verdict was general. In view of the other issue, going to the validity of the note itself, the plaintiff necessarily rests its right of recovery upon the question we have discussed.

Order affirmed.

H. D. FORCE AND W. W. FORCE, COPARTNERS DOING BUSINESS AS FORCE BROTHERS v. FRANK GOTTWALD.¹

June 17, 1921.

No. 22,264.

Landlord and tenant — breach of contract by landlord — measure of damages.

1. Ordinarily, the measure of damages for a breach by the lessor of a covenant to make improvements, is the difference between the rental value of the premises in their actual condition and in the condition in which the lessor agreed to put them.

Same — loss of profits.

2. But where the lessor rents the premises for a business which cannot be carried on in cold weather without artificial heat, and agrees to furnish and install the apparatus necessary to provide such heat, and the business after being established and operated during the warm months is interrupted by his failure to install such apparatus, he is liable to the lessee for loss of profits if such loss was a direct consequence of his breach of the contract and the amount thereof is not contingent or speculative but is shown with reasonable certainty.

Evidence of amount of loss.

3. The amount of such loss resulting from the interruption of an established business may be shown by showing the amount of profits for a reasonable period immediately preceding such interruption, if the other conditions were substantially the same.

Entries in book admissible.

4. The correctness of plaintiff's record of receipts and expenditures having been established by the one who made the entries, it was properly received in evidence as a memorandum in connection with his testimony.

¹Reported in 183 N. W. 356.

Construction of writing.

5. The instrument, executed by the parties, evidenced a present contract of leasing, and not an agreement to make a lease in the future.

Action in the district court for St. Louis county to recover \$3,150 damages for failure to make repairs, alterations and improvements upon a certain building. The case was tried before Childress, J., who when plaintiffs rested denied defendant's motion for dismissal of the action and at the close of the testimony defendant's motion for a directed verdict, and a jury which returned a verdict for \$944, and answered certain questions as stated in the opinion. (See page 270.) Defendant's motion for judgment notwithstanding the verdict was denied, and his motion for a new trial was granted unless plaintiff consented to a reduction of the verdict from \$944 to \$711.62. From the judgment entered pursuant to the verdict, as reduced by the order for judgment, defendant appealed. Affirmed.

W. H. Phelps, for appellant.

Thos. J. Doyle, for respondents.

TAYLOR, C.

Plaintiffs are engaged in the business of repainting and refinishing automobiles.

Defendant is the owner of a brick building consisting of two stories and basement known as number 210 Central avenue in West Duluth. For some years the ground floor was occupied as a clothing store; the second floor is fitted up as a public hall, and is also rented at stated times to various lodges as a place for holding their meetings. On February 21, 1919, plaintiffs and defendant entered into the following agreement:

"Five year lease at \$165.00, entire building, first privilege renewal at price to be agreed upon:

"Received of H. D. Force and W. W. Force \$50.00 and no-100 dollars account one months rent Grade floor and basement Gottwald Building 210 Central Ave. Gottwald to get rent hall until such time as improvements and additions are complete. This is portion of agreement by which Force Bros. are to Rent the entire Bldg. at \$165.00 per

month when addition of 45x50 feet is added to present Building when heat and repairs agreed upon and to be agreed upon are completed. Above rent to apply from March 1st to April 1st 1919. Rentors to furnish heat and fuel necessary for entire building. Also to be responsible for any freeze up or damage occasioned by neglect on part of rentors. Owner to keep roof in repair and do all outside improvements necessary. Building to be repaired and built according to plans to be submitted.

"Force Bros.

"By H. D. Force and

"W. W. Force.

Accepted

Frank Gottwald

By E. G. Kreidler,
Agent."

Plaintiffs took possession of the ground floor and basement of the building on March 1, 1919, and paid rent at the rate of \$50 per month until June 1, 1919, on which date they took possession of the entire building including the addition, and thereafter paid rent at the rate of \$165 per month until they vacated the premises in the spring of 1920. In December, 1919, and while still in possession of the premises, they brought this suit for damages for defendant's failure to make certain improvements, alterations and repairs which he had agreed to make. In their complaint they set forth four causes of action. In the first they asserted a claim for loss of profits; in the second a claim for the difference between the rental value of the premises without the improvements and the rental which they had agreed to pay; in the third a claim for the expense of installing certain water pipes. The fourth cause of action was abandoned at the trial, but the three above mentioned were submitted to the jury. In answer to specific questions submitted to them, the jury found that plaintiffs were entitled to recover the sum of \$854 on the first cause of action, the sum of \$70 on the second cause of action, and the sum of \$20 on the third cause of action. They returned a general verdict for the aggregate amount of these sums. Thereafter defendant made an alternative motion for judgment notwithstanding the verdict or for a new trial. On examining the record the court concluded that there was no evidence to sustain the verdict on either the second or third causes of action or to sustain a verdict of more than \$711.62 on the first cause of action, and

made an order granting a new trial unless plaintiffs consented to reduce the general verdict to the sum of \$711.62. Plaintiffs consented to the reduction and judgment was entered on the verdict as so reduced. Defendant appealed from the judgment.

The trial court having eliminated the other three causes of action and the plaintiffs having acquiesced therein, the question remaining is whether the plaintiffs established a right to recover for loss of profits.

The written memorandum shows on its face that it does not cover the entire contract. While the parties disagree as to some of the terms of the contract not set forth in the writing, there is practically no dispute concerning the facts on which the claim for loss of profits is based. It was understood by both parties that plaintiffs were renting the building for the purpose of using the ground floor as a shop in which to repaint and refinish automobiles. To fit it for this use defendant agreed to make various improvements, alterations and repairs. To carry out these undertakings he constructed an addition to the rear of the building 40x50 feet, and made various other changes not involved on this appeal. These were completed during the spring of 1919.

The building was heated by steam. To clear the floor so that automobiles could be moved about conveniently, defendant had agreed to remove two radiators from the middle of the building and install them against the wall. He had also agreed to furnish and install additional radiators or steam coils sufficient to heat the building and the addition. The plaintiffs were to do their own heating, but defendant was to furnish the heating plant installed ready for use. He disconnected and removed the two radiators early in the spring, but did nothing toward replacing them or installing the additional apparatus until the middle of October, and did not have the heating plant ready for use until the first day of November.

The evidence shows that the work of painting and finishing an automobile can only be done in a place where the temperature is at least as high as 73 degrees Fahrenheit, that it is impossible to do a good job of painting and finishing in a cold room. Plaintiffs repainted and refinished automobiles during the summer, but the weather became so cold in September and October that they were unable to do such work without artificial heat and were obliged to quit until the heating plant

was ready for use. The claim in controversy is for the loss of profits or earnings during these two months caused by defendant's failure to install the heating apparatus as agreed.

It is well settled that, under ordinary circumstances, the measure of damages for a breach by the lessor of a covenant to make improvements and repairs, is the difference between the rental value of the premises in their actual condition and their rental value in the condition in which the lessor agreed to put them. *Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194; *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289; *Warren v. Hodges*, 137 Minn. 389, 163 N. W. 739; 18 Am. & Eng. Enc. (2d ed.) 233; 16 R. C. L. 792. Defendant invokes this rule and insists that plaintiffs cannot recover for loss of profits, but only for diminished rental value, and that they failed to establish a cause of action because they failed to show the rental value.

There are exceptions to the rule that such damages are to be measured by the diminution in the rental value. In *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847, a case in which the lessor agreed to make alterations and repairs at a stated time but failed to do so and interrupted the lessee's business to make them at a later time, it is said [p. 256]:

"When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are; nor are the ordinary profits incident to such a business contingent or speculative, in the sense that excludes profits from consideration as an element of damages. What they would have been, in the ordinary course of the business, for a period during which it was interrupted, may be shown with reasonable certainty. What effect extraordinary circumstances would have had upon the business might be contingent and conjectural, and any profits anticipated from such causes would be obnoxious to the objection that they are merely speculative; but a history of the business, for a reasonable time prior to a period of interruption, would enable the jury to

determine how much would be done under ordinary circumstances, and in the usual course, during the given period; and the usual rate of profit being shown, of course the aggregate becomes only a matter of calculation."

To recover prospective profits as damages for a breach of contract, it must appear that the loss of the profits was not a remote but a direct consequence of the breach; that the anticipated profits did not depend on contingencies but were reasonably certain to accrue if the contract had not been breached; and that the amount of such profits was not conjectural or speculative, but was proven with reasonable, though not necessarily absolute, certainty. *Cushing v. Seymour, Sabin & Co.* 30 Minn. 301, 15 N. W. 249; *Doud, Sons & Co. v. Duluth Milling Co.* 55 Minn. 53, 56 N. W. 463; *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638; *Casper v. Klippen*, 61 Minn. 353, 63 N. W. 737, 52 Am. St. 604. It must also appear that the circumstances were such that the loss of such profits may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. In *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 71, 24 N. W. 344, the defendant was unable to operate his sawmill because the boom company refused to deliver his logs, and it was held that he was entitled to recover for loss of profits as the company had knowledge of the facts. In *Cargill v. Thompson*, 57 Minn. 534, 59 N. W. 638, plaintiff had a lease of a certain amount of water power to operate a flour mill, and it was held that he could recover for loss of profits caused by failure to furnish the full amount of such power. A similar ruling was made in *Johnson v. Wild Rice Boom Co.* 118 Minn. 24, 136 N. W. 262. See also *Emerson v. Pacific C. & N. P. Co.* 96 Minn. 1, 104 N. W. 573; *Independent Brewing Assn. v. Burt*, 109 Minn. 323, 123 N. W. 932; *Poposkey v. Munkwitz*, 68 Wis. 322, 32 N. W. 35, 60 Am. Rep. 858, *Raynor v. Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 343.

In the present case defendant rented the premises to plaintiffs for use as a shop in which to repaint and refinish automobiles, and agreed to furnish and install the apparatus necessary to warm the building properly. As early as June he was requested by plaintiffs to install the apparatus at once and promised to do so. Similar requests followed by

similar promises were made at frequent intervals until it was finally installed. He explains the delay by saying that he was unable to get steamfitters to do the work earlier. We think plaintiffs brought themselves within the rule entitling them to recover for loss of profits. To show the amount of such loss they proved the amount of their profits or net earnings over and above expenses, for each of the months of June, July, August, September, October and November, also that in September and October they had in the shop waiting to be done enough work to furnish full employment for them and their men during those months, and that they refused additional work offered them because they were unable to do it. Except for lack of heat the conditions seem to have been as favorable in September and October as in the other months, but the profits for those months were only a small part of the average profits for the other months. Proving these facts was the proper way to show the loss sustained, and established the amount of such loss with sufficient certainty. *Goebel v. Hough*, 26 Minn. 252, 2 N. W. 847; *Aldrich v. Wetmore*, 56 Minn. 20, 57 N. W. 221; *Johnson v. Wild Rice Boom Co.* 118 Minn. 24, 136 N. W. 262; *Raynor v. Blatz Brewing Co.* 100 Wis. 414, 76 N. W. 343.

The plaintiffs were brothers and devoted their entire time to the business. H. D. Force was an expert in that line and did much of the finishing work himself; W. W. Force did work which was less particular and took charge of the financial end of the business. They did a strictly cash business, paying all their expenses in cash as they accrued and receiving cash for each job of work when it was finished. They kept no formal set of books. They noted on temporary memorandum books or slips each job as it was received and amount paid when it was finished, and their expenditures as they were made. At or shortly after the end of each month W. W. Force entered the receipts and expenses during that month in a book kept for that purpose. On one side of the account he entered the amount received for each job and on the other side the amount expended for wages to their employes, for material, for rent and for other items, and struck a balance showing the net earnings or profits for that month which they divided equally between themselves as their own compensation. This record was the

only permanent book which they kept and was received in evidence in connection with the testimony of W. W. Force.

Defendant insists that this book was not an account book within the meaning of the statute, and that the court erred in receiving it in evidence. Whether it was or was not an account book within the meaning of the statute, we think it was properly received in evidence in connection with the testimony of W. W. Force. The entries in it were made by him as a part of his duties and were made as a record of the business transactions of the firm. He testified that he made all these entries himself, and, in substance, that he knew they were correct at the time he made them. Such a memorandum thus authenticated and made a part of the testimony of the witness is admissible in evidence independent of the statute making account books competent evidence. 1 Wigmore, Ev. §§ 737, 738, 747; Meyers v. McAllister, 94 Minn. 510, 103 N. W. 564; Naas v. Chicago, R. I. & Pac. Ry. Co. 96 Minn. 84, 104 N. W. 717; Fortier v. Skibo Timber Co. 111 Minn. 518, 127 N. W. 414.

Defendant also contends that the written instrument executed by the parties was not a lease, but only an agreement to make a lease at some time in the future, and that plaintiffs, by taking possession under it, became tenants at will, and that a tenant at will cannot recover damages from his lessor for failure to make improvements or repairs.

We are unable to sustain defendant's contention as to the nature of this instrument. We think it evidenced a contract by which the premises were then leased to the plaintiffs, and not an agreement to give them a lease at some indefinite time thereafter. It contains the statement "five year lease," a provision for renewal, an acknowledgment of the payment of \$50 as one month's rent, the month to begin March 1, 1919, a provision that the rent is to be \$165 per month for the entire building when the improvements are completed, a provision that the lessees are to heat the building and the lessor is to keep the roof and the outside in repair, and clearly contemplates that the term is to begin before the improvements are made, or at least before they are completed. These terms and provisions do not harmonize with defendant's theory but import a present leasing, and we find nothing to indicate that the parties intended any further action by either before

the contract went into effect.

Of course plaintiffs could not recover for loss of profits and also for diminished rental value, but, as the case now stands, we find no error which would justify directing a new trial and the order appealed from is affirmed.

IN THE MATTER OF THE ESTATE OF MARION DOUGLAS,
DECEASED,

MAY E. LIEDEL AND OTHERS v. EFFIE S. HOLMAN
AND OTHERS.¹

June 17, 1921.

No. 22,270.

Construction of legacy in will.

1. A will in this action is construed and held to authorize payment of a legacy only out of any residue remaining after providing for certain specific gifts and annuities.

Not a demonstrative legacy.

2. A demonstrative legacy is a money gift, made a charge on a specific fund, but payable at all events if the fund fails. The legacy in question is not a demonstrative legacy.

In the matter of the estate of Marion Douglas, deceased, May E. Liedel and Edward C. Liedel appealed from the final decree of the probate court for St. Louis county to the district court for that county. The appeal was heard by Fesler, J., who affirmed the decree of the probate court. From the judgment affirming the final decree, May E. Liedel and Edward C. Liedel appealed. Affirmed.

H. J. Grannis, for appellants.

H. B. Haroldson and *C. N. Blanchard*, for respondents.

HALLAM, J.

1. Marion Douglas, a Duluth lawyer, made a will in which he made

¹Reported in 183 N. W. 355.

specific disposition of his homestead, library, household goods, apparel, and other personal property, and then, by section numbered 3, provided "that all the balance of my estate" shall be received by trustees to be by them converted into income-bearing securities, "the income of which" to the amount of \$200 per month was to be paid to his wife during her life, and "out of the balance of said income" the sum of \$300 per year for life to each of three sisters and one brother, with a provision for proportionate payment to the sisters and brother in case the income shall be insufficient to pay the full amount of the annuities. Then, after directing the taking of \$3,000 out of the first moneys available for the purchase of a home for the sisters, sections numbered 5 and 6 provide:

"5. It is also my wish and will that at any time after my property has been converted into income-bearing securities, sufficient to insure the payment of the above monthly and semi-annual payments therein provided for, on a basis of five per cent annual interest, my trustees shall, out of the residue of my estate, pay to Edward C. Liedel, my friend and former partner, of Duluth, Minnesota, the sum of ten thousand dollars (\$10,000.00) or such part thereof as may be available after providing for the monthly and the semi-annual payments as above specified."

"6. It is further my will that after the payment of the amounts above specified, and provided for, that out of the residue of my estate, if so much remain, there be paid to Bates College, of Lewiston, Maine, the sum of ten thousand dollars (\$10,000.00)."

"My said wife to have the right to dispose by will of one-third of any residue that may remain after making all the above mentioned payments; the other two-thirds of the residue that may remain after making such payments above specified, I give, devise and bequeath to the heirs of my deceased brother, Albion L. Douglas, residing in the State of Maine, or their heirs and legal representatives."

We have made two paragraphs of section 6. In the will as executed there was but one.

The probate court, and, on appeal, the district court, held that the legacy to Liedel could be paid only in the event that a balance remained after taking out the \$3,000 and an amount which, on the basis

of 5 per cent interest, would yield the annuities mentioned for the widow, sisters and brother. There was no such balance. In fact the estate was not sufficient to provide the designated trust fund for said annuities. The probate and district courts accordingly held that the Liedel legacy must abate.

The legatee contends it was the intention of the testator that, even though there should not be sufficient in the trust fund to produce the annuities, to pay the \$3,000, and to pay the legacy, still, any part of the legacy remaining unpaid should be paid out of the estate to be distributed after the expiration of the trusts. This would result in ultimate payment of the Liedel legacy, for the amount required to produce the annuities is not constant and will diminish and finally reduce to nothing as the beneficiaries one after another die. The legatee contends that as such contingencies happen, the legacy shall be paid out of the funds so released.

We agree with the construction adopted by the probate and district courts. Taking all the provisions of the will into account, this seems to us to have been the intention of the testator.

It is urged that this construction attaches a different meaning to the word "residue" in section 5 from that given to the same word in section 6. This is true, but we think it plain that the testator intended a different meaning in the two cases. The similar word "balance" is used in a still different sense in section 3.

2. It is contended that this is a demonstrative legacy, and not a specific legacy. A demonstrative legacy is a money gift, made a charge on a specific fund and directed to be paid out of that fund, but payable at all events even if the fund fails, if the residue be sufficient. *Addington v. Smith*, 83 Me. 551, 22 Atl. 470; *Methodist Episcopal Church v. Hebard*, 28 App. Div. 548, 51 N. Y. Supp. 546; *In Re Wilson's Estate*, 260 Pa. 407, 103 Atl. 880, 6 A. L. R. 1349. In the event of failure of the fund, such a legacy becomes a general legacy. A specific legacy, on the other hand, fails if the specific fund or thing given fails. *Merriam v. Merriam*, 80 Minn. 254, 259, 83 N. W. 162.

This is not strictly a specific legacy. It is a general gift out of a certain residue on condition that such residue exists. It is not in our opinion a demonstrative legacy. We find nothing to evince an inten-

tion that, if the residue mentioned in section 5 does not exist, the legacy is to be paid out of the final distribution of the specific trust fund. Judgment affirmed.

FIRST NATIONAL BANK OF GOODHUE v. IOWA BONDING
& CASUALTY COMPANY.¹

June 17, 1921.

No. 22,291.

Action on bond guaranteeing payment of deposit.

1. The plaintiff bought a certificate of deposit issued by a bank at Tower on November 15, 1918. Its indorsers had recently purchased it from the payee. After the sale to the plaintiff the indorsers applied orally to the defendant for a bond guaranteeing payment, and paid the customary premium. It was issued on November 22, and was received by the plaintiff on November 30, at which time, in consideration of the bond, it released its indorsers. At the time of the oral application it was contemplated that the Tower bank would make a formal written application and it did so under date of December 2. The bond described the certificate of deposit, gave the name of the payee, and stated that it insured to the benefit of every subsequent holder for value. The Tower bank defaulted and the plaintiff brought suit on the bond.

Construction of bond — insurer not released by discharge of indorsers of certificate.

2. The bond is construed to insure to the benefit of the plaintiff bank. Upon payment of the certificate of deposit by the bond company, the latter would have no recourse against the indorsers to the plaintiff, or against anyone except the Tower bank, and the release of the indorsers by the plaintiff did not harm the defendant nor discharge the bond.

Bond construed in favor of the insured.

3. Such a bond is in the nature of an insurance contract and is construed in favor of those whose protection is intended.

Action in the district court for Ramsey county to recover \$2,568.82 on a contract guaranteeing the prompt payment at maturity of a cer-

¹Reported in 183 N. W. 832.

tain certificate of deposit. The case was tried before Olin B. Lewis, J., who made findings and ordered judgment in favor of plaintiff for \$1,937.99 and interest. From an order denying plaintiff's motion for amended findings and from an order granting defendant's motion for a new trial, plaintiff appealed. Reversed.

Davis, Severance & Morgan, for appellant.

Dille, Hoke, Krause & Faegre, for respondent.

DIBELL, J.

This is an action to recover on the guaranty by the defendant of the payment of a bank certificate of deposit. There were findings for the plaintiff. Afterwards a new trial was granted upon the ground of error in receiving in evidence the written application for the bond of guaranty by the bank issuing the certificate. The plaintiff appeals from the order granting a new trial.

1. On October 26, 1918, the Merchants & Miners State Bank of Tower, Minnesota, issued to the Mortgage Security Company of Minnesota, Incorporated, a certificate of deposit for \$2,500 due in 10 months. The mortgage security company indorsed the certificate in blank without recourse. It was purchased by Kelsey S. Chase, A. L. Mellenthin and A. Hirschman. On November 15, 1918, the certificate was purchased of them by the plaintiff bank in due course for value. It bore their unrestricted indorsements. Soon afterwards Chase and his associates procured a bond of guaranty through the St. Paul agency of the defendant and paid the premium. It was issued on November 22, 1918, from the company's office in Minneapolis. The original application was over the telephone. It was understood that the bank would make a written application. It did so. It was dated December 2, 1918, and was apparently received at the office of the company in Des Moines not later than January 2, 1919, and it was retained. The bond was received by the plaintiff bank on November 30, 1918. It then wrote Chase, stating that the bond covering the certificate of deposit was received and said: "In consideration of the above mentioned bond being given to secure the holder of said certificate of deposit from loss, we hereby release the indorsers of said certificate." The bonding company did not know of this release. So far as appears it did not know

what had become of the certificate. The three indorsers were solvent.

The written application of the bank was for a bond of guaranty for \$2,500 in favor of the mortgage security company for moneys placed on deposit and was "to take effect on Oct. 26, 1918, and to end on Aug. 26, 1919." It was on a printed form of the defendant. At the top right hand corner was the notation: "Amount of bond \$2500. Premium \$10.42. Bond to be in force from 10-26, 1918 to 8-26, 1919." The premium paid was for this period on the basis of five dollars per thousand for a year. The company by the bond guaranteed the prompt payment at maturity of "a certificate of deposit, dated the 26th day of October, 1918," issued by the Tower bank to the Mortgage Security Company and "endorsed in blank." The bond contained this further provision: "The obligation and liability of the guarantor shall extend and inure to each and every subsequent holder and transferee of said certificate for value."

2. The facts are as stated and are not in dispute. The contention of the defendant is that the plaintiff discharged the bond when it released Chase and his associates, its solvent indorsers. The foundation of the claim is that the plaintiff had recourse against them on the certificate of deposit, and that the defendant, if it paid, was entitled to follow them, therefore it was damaged, and was discharged by their release.

The bond guaranteed the payment of the certificate of deposit at maturity in the hands of whomsoever it might be. It was intended to run with the certificate. It took that form. When Chase and his associates orally applied for the bond, it was contemplated that the usual written application by the bank would be made. It was made. The parties interested were thinking of a bond which would guarantee Chase and his associates against the failure of the Tower bank to pay. The fact that the bond was executed after the negotiation of the certificate of deposit to the plaintiff is not under the circumstances important. The language of the bond indicated insurance from the date of the certificate. The written application was for such insurance. The guaranty was directly to the payee or holder of the certificate. The extension of liability "to each and every subsequent holder or transferee" was to holders and transferees subsequent to the payee, not merely those sub-

sequent in time to the actual delivery of the bond. Unless that was the effect, Chase and his associates got no protection for the premium which they paid, for they had at the time parted with the certificate. With the construction given to the contract the case presents no difficulty. The bonding company was not in the position of an indorsee under the law merchant. Upon default of the Tower bank it would be required to pay the then holder of the certificate. It would have no recourse against any indorser. Such is not the plan of these guaranty bonds. Some confusion has come from assuming the bonding company to be a subsequent surety for the plaintiff bank, which had as prior security the prior indorsements of its indorsers, to which the defendant should have recourse when compelled to pay, and by the release of whom it was damaged. The parties might have made such a contract. They did not. The terms of the policy are at war with such a claim. The bond protected the payee of the certificate and subsequent purchasers of it and against them the bonding company had no recourse in the event that it paid the certificate.

3. The guaranty was by a corporation authorized to guarantee deposits. It received pay for its risk. It undertook absolutely that the bank should pay. The bond was in the nature of an insurance contract and should be construed favorably to those for whose protection it was given. See *Lakeside Land Co. v. Empire State Surety Co.* 105 Minn. 213, 117 N. W. 431; *Brandrup v. Empire State Surety Co.* 111 Minn. 376, 127 N. W. 424; *George A. Hormel & Co. v. American Bonding Co. of Baltimore*, 112 Minn. 288, 128 N. W. 12, 33 L.R.A.(N.S.) 513; *American Credit Indemnity Co. v. Wood*, 73 Fed. 81, 19 C. C. A. 264; *Tebbetts v. Mercantile Credit Guaranty Co. of N. Y.* 73 Fed. 95, 19 C. C. A. 281; *Dunnell*, Minn. Dig. and 1916 Supp. §§ 9104-9107, and cases; 1 *Joyce, Ins.* § 339c; notes 33 L.R.A.(N.S.) 513; 47 L.R.A. (N.S.) 295.

We have noted the claim of the defendant relative to the admission in the plaintiff's reply that it accepted the bond. We do not give to it the effect urged, and a discussion is unnecessary.

We hold that the plaintiff bank did not discharge the bond by re-

leasing its indorsers. The trial court was right upon its first consideration of the case, and a new trial should not have been granted.

Order reversed.

BROWN, C. J. (dissenting).

The facts are quite fairly stated in the opinion, but a restatement of a part thereof is necessary to an understanding of my view of the case. The certificate of deposit was issued by the Merchants & Miners State Bank of Tower, on October 26, 1918, payable to the Mortgage Security Company. It was procured from the bank by one Hirschman, who was probably in some way connected with that company. Whether he procured it for the mortgage company, or for himself and associates, Chase and Mellenthin, is not made clear by the evidence. Chase testified that Hirschman was the "real owner," though he "supposed" that he and Mellenthin had some interest therein. But that is not important. On November 14, 1918, the certificate with the unrestricted indorsement of the security company and of Hirschman, Chase and Mellenthin was sold and transferred to the First National Bank of Goodhue, plaintiff in the action, in due course and for value. Thereafter on November 22, 1918, one week later, Hirschman, acting in the name of the Merchants & Miners Bank, the issuer of the certificate, procured from defendant, the Iowa Bonding & Casualty Company, the guaranty contract in question, whereby the bonding company guaranteed to the then or any subsequent holder the prompt payment of the same at maturity, or on the date of any renewal. The guaranty contract was so issued on an oral application, but, as stated in the opinion, with the understanding that a written application would be prepared and presented to the company. A written application was subsequently made by the Merchants & Miners' Bank, acting through its vice-president, Alfred Wadman and D. M. Rick, its cashier, and delivered to the bonding company as evidence of the transaction. It may be conceded that Hirschman attended to all the details in procuring the contract, but he kept under cover, using the name of the Merchants & Miners Bank, and he and his associates were not known to the bonding company at all, or that any interest they had in the matter was involved.

On November 30, 1918, the guaranty bond was delivered to the Goodhue bank by one Crest, who appears to have been acting for Hirschman, whereupon its president made and delivered a formal release and discharge of Hirschman, Chase and Mellenthin as indorsers of the certificate.

On the trial counsel for plaintiff cautiously declined to concede that the release was valid or effective. But it appears valid on its face and must be so treated in this court; it may, however, be open to the charge of fraud.

The certificate was not paid, the issuing bank being insolvent, and the Goodhue bank still remaining the holder thereof brought this action to recover on the guaranty contract. The bonding company interposed in defense the release of the indorsers, to its prejudice.

The liability of the bonding company on the guaranty contract was that of guarantor of payment, and it is entitled to the legal protection accorded to that relation of secondary liability. It would, on the payment of the debt, be entitled to subrogation to all rights, remedies and securities held by the principal against the debtor at the time the guaranty was made, 3 Dunnell, Minn. Dig. §§ 9045, 9046; a relinquishment of any of which, without the consent of the guarantor, would release and discharge it from further liability. At the time the guaranty was made, Hirschman, Chase and Mellenthin were liable for the payment of the certificate as indorsers, but were subsequently released therefrom by plaintiff, and without the knowledge or consent of the bonding company. That such release discharged the bonding company as guarantor there can be no question in the law. 20 Cyc. 1477.

The effort to spell into the guaranty contract a purpose of the bonding company to release the indorsers then liable for the payment of the certificate, finds no support in the record. The indorsers were not before the bonding company at all, and their anxiety or purpose to be released was not presented, or, so far as the record discloses, considered in any way. Hirschman and associates kept well under cover, in fact, paraded under the skirts of the insolvent Merchants & Miners Bank, the application for the guaranty being made in its name, with no reference to the indorsers, who then had no title to the certificate, their only relation thereto then being one of liability. To say, judicially,

on this state of the facts that the bonding company intended the guaranty contract as a protection of the indorsers who were liable for the payment of the certificate, is, in my opinion, wholly unjustified.

In the absence of some clear showing of a contrary intention, the contract can be given prospective operation only. *Wales v. New York B. F. Ins. Co.* 37 Minn. 106, 107, 33 N. W. 322. On its face the contract was intended for the protection of the then or any subsequent holder of the certificate against loss from the failure of the debtor to pay, and not to release securities held by the creditor for its payment.

The whole transaction to me has a malodorous atmosphere; one of deception and fraud. The First National Bank of Goodhue was made an innocent participant by the machinations of the indorsers, acting through Crest, who does not, however, appear to have been a wrongdoer, but who negotiated the sale of the certificate to plaintiff. The bonding company is made the victim by the action of this court in giving, as a matter of law, retroactive operation and effect to the guaranty, and spelling into the contract an intent and purpose to release and discharge the manipulators, who were not before the company at all. In my opinion that question was at least one of fact for a jury, and a new trial was properly granted to the end that it might be so submitted.

I respectfully dissent.

AMANDA M. NELSON v. AUGUST NELSON.¹

June 17, 1921.

No. 22,292.

Divorce — jurisdiction over property statutory.

1. In the absence of statutory authority the courts have no power in divorce proceedings to deal with the property rights of the parties.

Community property not recognized in Minnesota.

2. The doctrine of community property, as applied to the marriage relation, in force in some of the states of this country, exists only by

¹Reported in 183 N. W. 354.

statute, has never been adopted or made a part of the law of this state, and a distribution of property in divorce proceedings cannot be made thereunder.

No resulting trust where husband buys land in name of wife.

3. G. S. 1913, § 6706, providing that where a grant of land is made to one person, the consideration being paid by another, no trust shall result in favor of the one making the payment, applies to a case where the husband pays the consideration and causes the title to be vested in the wife.

Wife's title in such case absolute, when.

4. In such case the wife becomes the absolute owner of the land, subject only to the rights of creditors, and it cannot be taken from her in divorce proceedings, except to the extent authorized by G. S. 1913, § 7124, where a divorce is granted the husband.

Action in the district court for Hennepin county for absolute divorce, alimony and for other relief. The case was tried before Hale, J., who made findings, ordered judgment in favor of plaintiff and awarded her certain property. From the decree entered pursuant to the order for judgment, defendant appealed. Affirmed.

L. F. Lammers, for appellant.

Roberts & Strong, for respondent.

BROWN, C. J.

Action by the wife against the husband for divorce on the ground of cruel and inhuman treatment. Plaintiff had judgment and defendant appealed.

The only question presented is whether the trial court erred in refusing to assign and decree to defendant a part of the property standing in the wife's name which was acquired by the joint efforts of the parties during the marriage relation. We answer it in the negative.

The findings of the trial court of cruel and inhuman treatment are not challenged, and thereon a divorce was properly awarded to plaintiff. The facts in reference to the property and the acquisition thereof are not in dispute. It appears that the parties intermarried at Detroit, Becker county, this state in August, 1897, and for 20 or more years past have resided in the city of Minneapolis with their only child, a

daughter now about 20 years of age. Soon after taking up their residence in Minneapolis, defendant purchased a dwelling house, which has since constituted the family home, and later two vacant lots near the residence. The purchase price of both properties, aside from small contributions by plaintiff from her separate property, and her economy and savings in the management of the household affairs, was paid from the earnings of defendant. He caused the title of the property to be placed in the name of his wife and she now holds the fee simple thereto. The reasons for so vesting title in the wife are not material; whether voluntary on his part or at the earnest or other solicitation of the wife, the fact remains that she is now the legal owner of the property. G. S. 1913, § 6706.

The contention that the trial court should have made a division of the property between the parties is founded in the main on the theory that property acquired by the joint efforts of husband and wife during coverture, as here disclosed, is jointly owned by them as community property, whether placed in the name of one or both the parties. There is also the claim that since the husband in this case bought and paid for the property, placing the title in the wife at her request, a trust arose in his favor, vesting in him equitable rights to at least a share thereof, which the trial court erred in refusing to recognize. Neither contention can be sustained.

1. In the absence of statutory authority the courts have no power in divorce proceedings to deal with property rights of the parties. 19 C. J. 331. The subject is regulated by the statutory law of the several states. Provision is made by the statutes of this state for alimony to the wife, in the payment of which the property of the husband may be resorted to under order of the court, and for the restoration to her of her separate estate, also for the return to the husband of property standing in the name of the wife which she acquired through the husband during coverture, when the divorce is granted to him. G. S. 1913, § 7124, et seq. But no provision is therein found to meet a case like that at bar. *O'Neil v. O'Neil*, 148 Minn. 381, 182 N. W. 438.

The doctrine of community property, as applied to the marriage relation, of French, Spanish or Teutonic origin, has never been adopted in this state, though it has been made by statute the law of several

other states. 21 Cyc. 1633. It was unknown to the common law of England, and exists in this country only in those states where it has been so adopted by legislation. 1 Schouler, Marriage, Divorce, Separation & Domestic Relations, § 581; 5 R. C. L. 825. This state has always firmly adhered to the rule of separate property rights of both husband and wife, with the exception and to the extent provided by the statutes cited, and the community doctrine apparently has not found favor with the lawmaking authority. The doctrine therefore has no application to the case at bar, and the learned trial court did not err in refusing defendant relief thereunder.

✓ 2. Equally untenable is the further contention that defendant has certain equitable interests in the property, arising from the fact that he paid the purchase price thereof, placing the title in the wife at her request, and which, as defendant claims, she now holds in trust for his benefit. The point is disposed of adversely to defendant by G. S. 1913, § 6706, wherein it is provided that, when a grant of land for a valuable consideration is made to one person, the consideration being paid by another, no trust shall result in favor of the one making the payment, and that the title in such case shall vest in the person named as grantee, subject only to the claims of creditors. The statute is unqualified, except as to creditors, and applies to a conveyance of property to the wife, where the husband pays the consideration precisely as it applies to other persons. *Chapman v. Chapman*, 114 Mich. 144, 65 N. W. 215, 72 N. W. 131. The statute and the cases construing it will be found cited in *Anderson v. Anderson*, 81 Minn. 329, 84 N. W. 112.

This disposes of the case and the points made in support of the appeal, and leads to the conclusion that the learned trial court correctly refused defendant's claim to a division of the property in question.

Judgment affirmed.

WILLIAM H. WULKE v. LUCRETIA D. WULKE.¹

June 17, 1921.

No. 22,316.

Divorce — first action not res judicata in second action by other spouse.

1. The wife brought an action for divorce on the ground of cruel and inhuman treatment. The divorce was denied. After the lapse of a year since the wife left, the husband brought this action for divorce on the ground of desertion. She denied the desertion, and counterclaimed for support, alleging that the husband's mistreatment had compelled her to leave him. It is *held*, following *Stocking v. Stocking*, 76 Minn. 292, that the first action is not res judicata of the issues raised by the answer in the second action.

Findings sustained by evidence.

2. There is evidence reasonably supporting the findings that there was no wilful desertion of defendant, and that plaintiff's mistreatment of defendant rendered it unsafe and improper to longer cohabit with him.

Action in the district court for Hennepin county for absolute divorce. The case was tried before Jelley, J., who made findings that plaintiff was not entitled to a divorce, but that he pay defendant \$65 monthly for her maintenance and support. From an order denying his motion for amended findings and conclusions or for a new trial, plaintiff appealed. Affirmed.

Arthur M. Higgins and *Charles F. Keyes*, for appellant.

George T. Simpson, *John F. Dahl* and *Eugene S. Bibb*, for respondent.

HOLT, J.

The parties married in September, 1917. He was 58 years old and she was 52. Each had grown children by a former marriage. Plaintiff's son made his home with him, and two of defendant's daughters

¹Reported in 183 N. W. 349.

also came there to live. After some months friction arose, but apparently nothing more serious happened than a removal of defendant's daughters from the home. A few days thereafter, when plaintiff was on a business trip to South Dakota, the defendant left, taking her property along. Shortly afterwards she brought an action for divorce on the ground of cruel and inhuman treatment. The court found the allegations of the complaint "that after the date of said marriage defendant (this plaintiff) began and thereafter continued to treat plaintiff in a cruel and inhuman manner or that by reason of any acts of conduct of the defendant, plaintiff (this defendant) was compelled to leave the said defendant, are untrue." Judgment of dismissal was entered upon the findings. A little over a year after defendant had removed from plaintiff's home he brought this action for divorce, alleging desertion. She counterclaimed for maintenance, alleging misconduct on his part as ground for living separate. The court found that defendant did not wilfully desert plaintiff and also found that on July 14, 1918, defendant left plaintiff's home as a result of his treatment, which treatment rendered it unsafe and improper for her longer to cohabit with him, and awarded her separate maintenance. He appeals from the order denying the motion to amend the findings or grant a new trial.

Plaintiff plants his appeal on two propositions: (1) The judgment in the former action is *res adjudicata* in this; and (2) the decision is not justified by the findings.

1. The complaint in the action brought by defendant for divorce on the ground of cruelty is not a part of the record, and it cannot be said that the acts and conduct with which this plaintiff was there charged are the same acts and conduct alleged against him in the answer herein. Nor is there any testimony showing what evidence was adduced in the former suit. But that aside, this court is committed to the doctrine that there may be such misconduct of one spouse as to justify the other in leaving, even though it may not constitute cruel and inhuman treatment entitling to an absolute divorce, and that the leaving under such circumstances is not wilful desertion. *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668. It is therefore clear that the judgment in the former action cannot be *res adjudicata*, either upon the issue of wilful desertion charged against defendant, or upon

the issue of misconduct of plaintiff justifying defendant in living apart from him. The proof need not be of the same quantity or quality to establish the issue of misconduct in this case as was required in the first in order to succeed; nor was the evidence or finding made in the former case upon the wife's justification for leaving the husband necessarily addressed to the same issue now made by her answer.

2. We are not greatly impressed with the evidence of the alleged misconduct on the part of plaintiff, but we are not triers of fact. Our sole function is to determine whether there is evidence reasonably supporting the facts found by the trial court on the issue of the husband's misconduct and its bearing on the wife's alleged desertion. In *Stocking v. Stocking*, supra, it was said with reference to this defense: "It is sufficient if the party withdrawing from the cohabitation has reasonable grounds for believing, and does honestly believe that, by reason of the actual misconduct of the other, it cannot be longer continued with health, safety or self-respect. Wilful desertion, in such a case, does not begin until after the offending party has in good faith exhausted all reasonable efforts to right the wrong, and to satisfy the injured spouse that there will be no recurrence of the causes which induced the separation, nor until after the lapse of a reasonable time for a consideration of the overtures for a reconciliation." There was testimony from the physician who treated defendant that cohabitation for at least some time was not advisable, and she might honestly have believed that because of her husband's misconduct as affecting her ailment she could no longer live with him safely and with self-respect. Nor does the record show any overtures by him toward reconciliation, or any endeavors to prove or promise such behavior in the future that she could return. We, therefore, cannot hold that there is no evidence reasonably sustaining the findings.

Order affirmed.

On October 14, 1921, the following opinion was filed:

HOLT, J.

In the petition for reargument the case of *Wagner v. Wagner*, 36 Minn. 239, 30 N. W. 766, was cited as decisive of the question that the cruelty alleged in the divorce action brought by this defendant, and

determined against her, is *res adjudicata* on the proposition that she had no just cause to live apart from him, because, if she had such cause, the court should have therein awarded separate maintenance under section 7140, G. S. 1913. The issue in the instant case was desertion. Unless the wife had wilfully deserted the husband he had no cause of action. The court found against him on that issue. Even though the finding in the former case was that her allegation, that she was compelled to leave defendant because of his cruelty and misconduct, was not true, she might nevertheless be justified in temporarily living apart. The question in the Wagner case was whether the wife, having been denied an absolute divorce on the ground of cruelty, could thereafter maintain an action for a limited divorce predicated upon the same acts of cruelty. It was rightly held she could not. There is no difference in the degree of cruelty which justifies a decree for an absolute and one for a limited divorce. But the cruelty, which justifies a spouse in living apart from the other, may not entitle to a divorce at all. In the instant case the wife was permitted to withdraw her counterclaim for a limited divorce. So that the only issue remaining was whether her living apart was a wilful desertion. If the finding that it was not, is sustained, and we think it is under the rule of *Stocking v. Stocking*, 76 Minn. 292, 79 N. W. 172, 668, the judgment must be affirmed, for no error is assigned as to the part granting separate maintenance. The former decision is adhered to.

ROSEAU COUNTY v. TOWNSHIP OF HEREIM, ROSEAU
COUNTY, MINNESOTA, SUBSTITUTED FOR
GUNDER PEDERSON.¹

June 17, 1921.

No. 22,320.

State road — action against town for conversion of bridge material.

1. Whatever proprietary title or interest an organized town may have

¹Reported in 183 N. W. 518.

in and to the material in bridges and to culverts constructed and installed upon regularly laid out town roads, ceases and terminates by operation of law upon a transfer of the road to the county by action of the board of county commissioners under G. S. 1913, § 2505, in declaring it a state road.

Legislature may appoint new trustee for the public.

2. In respect to such material the town holds the naked legal title in trust for the public, and the legislature lawfully may transfer it to the county as a new trustee; such was the necessary effect of the statute and the proceedings thereunder in this case.

Action in the district court for Roseau county to recover \$354 for conversion of certain timber and bridge material. The case was tried before Watts, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, the substituted township appealed. Affirmed.

W. E. Rowe, for appellant.

Alexander Fosmark and M. J. Hegland, for respondent.

BROWN, C. J.

Action by the county of Roseau against the town of Hereim, an organized congressional township of the county, for the alleged conversion of a quantity of timber and bridge material, which the county claims to own. Plaintiff had judgment and defendant appealed.

The facts are not in dispute. In 1899 the board of supervisors of defendant town duly laid out a public road within the township, and thereafter worked and improved the same for public use. In 1911 and again in 1913 the road was intersected and crossed by certain drainage ditches, and it became necessary to build bridges or install culverts at the points of intersection. The obligation to do this was imposed on the town, in response to which its officers purchased material and constructed a bridge over the ditch at one point and installed suitable culverts at other points made necessary by the presence of the ditch. They were subsequently maintained and kept in repair by the town. On some date in January, 1914, the portion of this road leading south from the village of Greenbush, and in January, 1916, the portion thereof leading north from the village, were formally declared by resolution

of the board of county commissioners, acting under the provisions of G. S. 1913, § 2505, a part of the state road extending through the county. This was approved by the state highway commission as provided by the statute, and jurisdiction over and the obligation thereafter to maintain the road in repair for public use thereupon passed automatically from the town to the county. In 1918 the county caused the old bridge and culverts to be replaced with new and more substantial structures. The part of the old material not used by the changes so made was carted away by the town officers. The refusal to return it brought this action.

The trial court held that the material taken from the old bridge as well as the culverts belonged to the county, and judgment was ordered against the town for the value thereof with costs of the action. We concur in that conclusion. Whatever proprietary title or interest the town had to the material during the time the road remained a town charge, ceased and ended by operation of law when it passed to the control and jurisdiction of the county by the action of the commissioners in declaring it a part of the state road, as authorized by the statute. The town originally held merely the naked legal title to the material in trust for the public; the legislature lawfully could transfer the title to the county as the new trustee. 19 R. C. L. 766; *City of Columbus v. Town of Columbus*, 82 Wis. 374, 52 N. W. 425, and note in 16 L.R.A. 695. Such was the necessary legal effect and operation of the statute following the action of the county board thereunder. Both the county and town are mere agencies of the state with no rights in the discharge of governmental functions superior to the state. *Merchants National Bank of St. Paul v. City of East Grand Forks*, 94 Minn. 246, 102 N. W. 703.

The case of *Town of Lisbon v. Counties of Yellow Medicine and L. Q. P.* 142 Minn. 299, 172 N. W. 125, did not involve the question here presented and is not in point.

Judgment affirmed.

F. S. COURTRIGHT v. THE CITY OF DETROIT, MINNESOTA.¹

June 17, 1921.

No. 22,321.

Intoxicating liquor — recovery of license fee voluntarily paid.

1. A licensee to whom a liquor license is unlawfully issued by a city, cannot recover the license fee voluntarily paid, even though it was paid in the belief that the license might lawfully issue.

Same — rule not changed by erroneous decision of nisi prius court.

2. The fact that a nisi prius court had erroneously held that the city had the right to license the sale of liquor does not give the licensee a right of recovery.

Action in the district court for Becker county to recover \$490.36 for money had and received. Defendant's demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, was sustained by Parsons, J. From the order sustaining the demurrer, plaintiff appealed. Affirmed.

P. F. Schroeder, for appellant.

W. B. Carman, City Attorney, for respondent.

HALLAM, J.

The complaint alleges the following facts:

1. Detroit is situated within the boundaries of territory covered by the Chippewa Indian treaty of 1855. By the terms of that treaty, traffic in intoxicating liquor in that territory was prohibited "until otherwise provided by Congress." Congress never "otherwise provided." On January 9, 1911, the Federal district court of the district of Minnesota decided that the treaty provision was repealed by the act admitting Minnesota into the Union. *Gearlds v. Johnson*, 183 Fed. 611. An appeal was taken to the United States Supreme Court and on June 8, 1914, the decision of the district court was reversed

¹Reported in 188 N. W. 346.

and the treaty prohibition was held binding and operative, and in effect held that defendant city had no authority to issue any license to sell intoxicating liquor. *Johnson v. Gearlds*, 234 U. S. 422, 34 Sup. Ct. 794, 58 L. ed. 1383.

On March 28, 1914, plaintiff, in good faith, and believing and relying on the decision of the district court, and under an honest mistake as to his rights, made application to defendant city for a liquor license, and paid into the city treasury a license fee of \$1,500, and the city issued him a license to sell intoxicating liquors for one year. Upon learning of the decision of the United States Supreme Court, and on November 30, 1914, plaintiff closed his business and ceased selling liquor. He now brings this action to recover \$490.36, "said sum being such part of said license fee * * * as corresponds to the period of time from said 30th day of November, 1914, to the date of the expiration of the period in said liquor license." The trial court sustained a demurrer to the complaint. Plaintiff appeals.

We are of the opinion that this case is ruled by the decision in *Minneapolis Brewing Co. v. Village of Bagley*, 142 Minn. 16, 170 N. W. 704. In that case the village of Bagley, situated in the territory covered by the same treaty prohibition, had issued a license to sell liquor. During the period covered by the license, the electors of the village voted to prohibit the sale of liquors and the effect would have been to annul the license had it been valid. This court held the licensee had no right to recover any portion of the license fee paid, on the principle that where a license fee is paid voluntarily by the applicant for a license, without mistake of fact, the municipality receiving the same, in the absence of a statute otherwise providing, is not liable for a return of the money, even though paid under an invalid statute or otherwise not a legal demand. It was held that there was no legislative authority for such refundment and that there was, in such case, no mistake of fact. The treaty, it was said, was notice to all concerned, and, though unknown in fact, that did not relieve the situation. The same observations are pertinent here.

2. In the Bagley case the decision of the Federal district court did not enter, but we do not consider this important. Reliance on an erroneous decision which is afterwards reversed gives no right of action.

Kenyon v. Welty, 20 Cal. 637, 81 Am. Dec. 137; Pittsburgh & L. I. Iron Co. v. Lake Superior Iron Co. 118 Mich. 109, 76 N. W. 395; 13 C. J. 379.

Order affirmed.

STATE EX REL. MATHEW ELMS v. EARLE BROWN, AS
SHERIFF OF HENNEPIN COUNTY.¹

June 17, 1921.

No. 22,488.

Habeas corpus — discharge of defendant for void judgment in criminal case.

1. It is only where the court pronounces a judgment in a criminal case which is not authorized by law, under the indictment, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to require the discharge of the defendant upon habeas corpus.

Indictment for commission of crime — conviction for attempt to commit.

2. Under an indictment charging carnal knowledge of a child, under the age of consent, the accused may be convicted of an attempt to commit that crime, where the testimony failed to establish the commission of the crime charged, but did establish an attempt to commit such crime.

Discharge of defendant not warranted upon return of verdict of guilty — error did not go to jurisdiction.

3. It was the duty of the court upon receipt of the verdict either to pass judgment thereon or to set it aside and order a new trial, but not to discharge the defendant. If the court erred in this regard it was an error arising in the progress of the trial and did not go to the jurisdiction so as to be taken advantage of upon habeas corpus.

Upon the relation of Mathew Elms the district court for Hennepin county granted its writ of habeas corpus directed to Earle Brown as sheriff of that county. From an order, Jelley, J., quashing the writ and remanding relator to the custody of respondent, relator appealed. Affirmed.

¹Reported in 183 N. W. 669.

Brady, Robertson & Bonner, for relator.

Clifford L. Hilton, Attorney General, and *Floyd B. Olson*, County Attorney, for respondent.

QUINN, J.

Relator seeks release from prison through a writ of habeas corpus. The legality depends upon whether the judgment and commitment are absolutely void, because of the form of the verdict. It is the contention of relator that the verdict is not sufficient to support the judgment in that it fails to mention the age of prosecutrix or to designate the county in which the offense is claimed to have been committed, and that it makes no reference to the charge as contained in the indictment. The charging part of the indictment is as follows: "The said Mathew Elms on the fourth day of December, A. D. 1920, at the City of Minneapolis in said Hennepin county, Minnesota, then and there being did wilfully, unlawfully, wrongfully, knowingly and feloniously, carnally know and abuse one Elizabeth Harris, said Elizabeth Harris then and there being a female child under the age of eighteen years, to-wit: of the age of ten years, and not being then and there the wife of the said Mathew Elms."

The jury returned the following verdict: "We the jury find the defendant guilty of the crime of an attempt to commit the crime of carnal knowledge and abuse of a female child."

Thereafter the relator made a motion in arrest of judgment, which was denied, and judgment was thereupon entered adjudging the relator guilty of the crime of attempting to commit the crime of carnal knowledge and abuse of a female child and sentencing him to be confined at hard labor in the State Prison, at Stillwater, Minnesota, for a term of not to exceed 10 years in duration or until thence discharged by due course of law or by competent authority.

Section 8656, G. S. 1913, provides as follows:

"Every person who shall carnally know and abuse any female child under the age of eighteen years shall be punished as follows:

1. * * *

2. When such child is ten and under the age of fourteen years, by

imprisonment in the state prison for not less than seven years nor more than thirty years.

3. * * *

Section 8490, G. S. 1913, provides that:

"An act done with intent to commit a crime, and tending, but failing, to accomplish it, is an attempt to commit that crime; and every person who attempts to commit a crime, unless otherwise prescribed by statute, shall be punished as follows:

1. If the crime attempted is punishable by death or life imprisonment, the person convicted of the attempt shall be punished by imprisonment in the state prison for not more than ten years.

2. In every other case he shall be punished by imprisonment in the state prison for not more than half of the longest term, or by fine of not more than half the largest sum prescribed upon conviction for the commission of the offense attempted, or by both such fine and imprisonment;" * * *

Section 8476 provides that: "Upon the trial of an indictment the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime or of an attempt to commit the crime so charged, or of an attempt to commit a lesser degree of the same crime."

And section 9213 provides that, * * * "upon an indictment for any offense the jury may find the defendant not guilty of the commission thereof, and guilty of an attempt to commit the same * * * In all other cases, the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment."

It follows that, upon the trial of a person charged with the crime set forth in the indictment, if, in the opinion of the jury, the proof is not sufficient to warrant a conviction of the principal offense, but is sufficient to evince an intent on the part of the accused to carnally know the prosecutrix, coupled with the commission of physical acts on his part, tending but failing to accomplish his purpose, he may be convicted, under the statutes, of an attempt to commit the crime of carnal knowledge of such child. *State v. Masteller*, 45 Minn. 128, 47 N. W. 541.

We come then to the proposition whether the verdict as returned is

void upon its face. The verdict is not a model in form. If it is merely voidable then the remedy would be by appeal, but, if the judgment is void, then defendant is entitled to be released. The chief contention is that the verdict makes no reference to the charge as contained in the indictment, and consequently is not sufficiently definite to support the judgment. Therefore the court had no jurisdiction to pronounce sentence upon the relator and he is illegally imprisoned. We are unable to concur in this contention.

The court had jurisdiction over the defendant and the cause. The verdict is general in its scope, and, when construed in connection with the indictment, is sufficient. It fully informs the court of the offense of which it declared defendant guilty. "The writ of habeas corpus is not designed to fulfil the functions of an appeal or a writ of error. It is not intended to bring in review mere errors or irregularities, whether relating to substantive rights or to the law of procedure, committed by a court having jurisdiction over person and subject matter. Such errors and irregularities do not affect the jurisdiction of the court or render its judgment void, and the remedy is therefore by appeal, exceptions, or writ of error;" 21 Cyc. 285; *Ex parte Booth*, 39 Nev. 183, 154 Pac. 933, L.R.A. 1916F, 967; *Dover v. State*, 75 Ala. 40; *In re Black*, 52 Kan. 64, 34 Pac. 414, 39 Am. St. 331; *State v. Sloan*, 65 Wis. 647, 27 N. W. 616; *Willis v. Bayles*, 105 Ind. 363, 5 N. E. 8; *In re Satt*, 164 Mich. 472, 129 N. W. 863; *Keller v. Davis*, 69 Neb. 494, 95 N. W. 1028; *In re Casey*, 27 Wash. 686, 68 Pac. 185; *In re Eckart*, 166 U. S. 481, 17 Sup. Ct. 638, 41 L. ed. 1085; *Id.* 85 Wis. 681, 56 N. W. 375.

Assuming the verdict to be erroneous, so that it should have been set aside and a new trial granted, still it is evident that the court did not act without jurisdiction in pronouncing judgment upon the verdict rendered. The indictment was sufficient to and did charge the relator with the crime of carnal knowledge of a child under the age of consent. It was the duty of the court, upon receipt of the verdict, either to pass judgment thereon, or to set it aside and order a new trial, but not to discharge the defendant. If the court erred in this regard, it was simply an error arising in the progress of the trial, and did not go to

the jurisdiction of the court so as to be taken advantage of upon habeas corpus.

It is not questioned but that the court had full jurisdiction both of the subject matter of the action and of the person of the defendant, and, having rendered a judgment against the defendant which the law authorizes after trial and conviction, any errors of the court intervening before the sentence and judgment must be taken advantage of either by motion in the court where the trial is had, or upon writ of error or exceptions in the manner prescribed by the statute.

Under the provisions of subdivision 2 of section 8296, the officer before whom the writ is returnable shall forthwith remand the relator if it appears that he is detained in custody "by virtue of the final judgment of a competent court of civil or criminal jurisdiction, or of an execution issued upon such judgment." It is only when the court pronounces a judgment in a criminal case which is not authorized by law, under any circumstances in the particular case made by the pleadings, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void, so as to justify the discharge of the defendant held in custody by such judgment. *State v. Sloan*, supra; *People v. Liscomb*, 60 N. Y. 571, 590, 604, 19 Am. Rep. 211; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Gibson*, 31 Cal. 628, 91 Am. Dec. 546; *Hurd, Habeas Corpus*, 327-332.

It is well settled by the weight of authority that a verdict in a criminal case will not be held void for uncertainty, if its meaning can be determined by reference to the indictment. *People v. Tierney*, 250 Ill. 515, 95 N. E. 447; *State v. Gregory*, 153 N. C. 646, 69 S. E. 674; *State v. Braden*, 78 Kan. 576, 96 Pac. 840; *In re McLean*, 84 Kan. 852, 115 Pac. 647, 35 L.R.A.(N.S.) 653; *Doolittle v. State*, 93 Ind. 272; *People v. Holmes*, 118 Cal. 444, 50 Pac. 675.

In *People v. Tierney*, it was said: "A verdict is not to be construed with the same strictness as an indictment, but it is to be liberally construed, and all reasonable intendments will be indulged in its support, and it will not be held insufficient unless, from necessity, there is doubt as to its meaning." Under this rule the verdict in the instant case is sufficient. Its language leaves no doubt as to its meaning or as to the intention of the jury.

In *State v. Ryan*, 13 Minn. 343 (370), the accused was indicted for murder in the first degree. The verdict read: "We, the jury in the case of the state of Minnesota against John Ryan, do find a verdict of murder in the first degree." In disposing of the case upon appeal in this court it was said: "The only rational general rule that can be adopted by which to measure its sufficiency, is, does it show clearly, and without any doubt, the intention of the jury and their finding on the issues presented to them? If it does, it cannot be declared bad without sacrificing substance and justice to form."

In *State v. New*, 22 Minn. 76, the verdict was: "The jury in this case find the defendant, Thomas New, guilty. We also find the value of the property embezzled to be forty dollars." The verdict was held sufficient.

In *State v. Eno*, 8 Minn. 190 (220), it was said: "Where the jury design to convict the prisoner of the offense with which he is charged, the verdict of 'guilty' is all that is required."

We are of the opinion and hold that the verdict in the instant case was sufficient to warrant the judgment and sentence, and that the writ of habeas corpus should be discharged. It is so ordered.

A. W. SELOVER, H. F. SCHULTZ AND G. H. SELOVER,
CO-PARTNERS AS SELOVER, SCHULTZ & SELOVER
v. CHARLES J. HEDWALL.¹

June 24, 1921.

No. 22,175.

Rulings of trial court not prejudicial — bill of particulars — account books.

1. The court did not exceed its discretion in permitting plaintiffs to prove their claim for services, although they had been four days late in serving their bill of particulars, nor in refusing to permit defendant

¹Reported in 184 N. W. 180.

to examine plaintiffs' accounts with other clients, and its failure to give such books to the jury was not prejudicial.

Attorney and client — failure to give information to client.

2. The facts alleged in defendant's second defense and counterclaim, to the effect that the directors of the investment company had authorized its attorneys to dismiss the action against him, if, by so doing, they could procure the dismissal of six actions brought by other parties in which the company was directly or indirectly a defendant, and that plaintiffs knew that such authority had been given but failed to inform defendant thereof, were not sufficient to constitute a defense or counterclaim and the court properly excluded the evidence offered thereunder.

Action in the district court for Hennepin county to recover \$3,165.01 for professional services and disbursements. The case was tried before Jelley, J., and a jury which returned a verdict for \$2,665.01. From an order denying his motion for a new trial, defendant appealed. Affirmed.

A. Ueland, for appellant.

J. A. Mansfield, for respondent.

TAYLOR, C.

Plaintiffs are attorneys at law. They brought this action to recover the reasonable value of professional services performed for defendant and their disbursements in his behalf, and recovered a verdict for the sum of \$2,665.01. Defendant settled a bill of exceptions and made a motion for a new trial. This motion was denied and he appealed.

Defendant contends that the court erred: (1) In receiving any evidence of plaintiffs' claims for services, they having failed to serve a bill of particulars within the time prescribed by the court; (2) in ruling that defendant could examine only those portions of plaintiffs' account books read in evidence; (3) in not giving these account books to the jury to take to the jury room, and (4) in excluding the evidence offered in support of his second defense and counterclaim.

1. Defendant served a demand for a bill of particulars. In response thereto plaintiffs furnished a statement, in which they set forth at considerable length the services which they had rendered in an action brought against defendant by the receiver of the Western Syndicate

Investment Company, and also the services which they had rendered at defendant's instance in preparing for an action to be brought in the United States District Court, attacking the validity of certain capital stock issued by the Surety Fund Life Company, an insurance company in which defendant was a stockholder. They also included in the statement an itemized bill of disbursements, amounting to the sum of \$65.01, and concluded the statement by saying that they charged the sum of \$3,500 as a reasonable fee for the services mentioned therein.

Defendant did not question the sufficiency of the statement in respect to disbursements, but demanded a further and more specific bill of particulars in respect to the services claimed to have been performed in matters other than the action brought by the receiver, and showing the amount claimed for services in that action and the amount claimed for services in each of such other matters. Plaintiffs made no response to this demand, and thereafter defendant procured an order from the court requiring them to serve, within five days, a more particular bill of particulars, showing the title of any action or proceeding, other than the action brought by the receiver, in which they claimed to have performed services, and the amount which they claimed for services in the action brought by the receiver and in each of such other actions or proceedings. Nine days thereafter plaintiffs served a further statement, giving the title of the other action in which they claimed to have performed services, and stating that the value of their services was the sum of \$3,500 in the action brought by the receiver, and the sum of \$500 in the other action. Defendant returned this statement, on the ground that it was not served within the time required by the order, and was not a copy of an account for services.

Nothing further was done until the action came on for trial, some eight months later, when defendant objected to any evidence of the account for services, on the ground that plaintiffs had failed to comply with the order requiring a more specific bill of particulars. This objection was overruled and the evidence admitted and defendant insists that the ruling was erroneous.

The action is not brought on an account, but to recover the reasonable value of services performed, and strictly speaking does not come within the provisions of section 7777, G. S. 1913. But, although the

services of an attorney are not expected to be itemized like an ordinary account, yet, if they extend over a considerable period of time, it is recognized that he should comply with a demand for a bill of particulars to the extent of advising the defendant of the character of the services, of the matters in which they were rendered and of the amount claimed therefor to enable the defendant to prepare his defense. *Davis v. Johnson*, 96 Minn. 130, 104 N. W. 766. The statements furnished by plaintiffs complied with these requirements. More than eight months elapsed after the service of the second statement before the action was brought to trial, and the slight delay in furnishing it was without prejudice to defendant. Under the circumstances the court would hardly have been justified in debarring plaintiffs from presenting their evidence, and the ruling was clearly within its discretion.

2, 3. Plaintiffs' accounts were kept in a loose leaf book. Defendant's name was written at the top of one of these leaves. On this leaf he was credited with one payment of \$300 and another of \$100 and was charged with disbursements aggregating \$13.89. None of these items were disputed and no other had been entered in the account. No entry had been made of the largest disbursement—an item of \$50 paid to another attorney for expenses—which seems to be undisputed, and no entry had been made of plaintiffs' charge for services. Later plaintiffs opened another similar book and carried forward the totals from this leaf to a similar leaf in the second book. Some error was made in carrying forward these totals, but that seems to be of no importance. A month or more after plaintiffs brought this suit, alleging the value of their services at the sum of \$3,500, they entered a charge for that amount in the second book. Plaintiffs did not attempt to prove their claim by their books, but produced them in response to a demand made by defendant. The plaintiff, who testified concerning the books, stated that the leaves read in evidence were the only ones containing anything relating to defendant, and objected to defendant's request to be permitted to examine the accounts with other clients, and on the assurance of plaintiffs' counsel that the other parts of the books contained nothing relating to defendant, which fact does not appear to have been disputed, the court ruled that defendant must confine his examination to

the portions of the book in evidence. We fail to see wherein defendant was prejudiced by this ruling or by the failure of the court to send the books to the jury room.

4. In his second defense, defendant set forth in substance that the receiver of the Western Syndicate Investment Company was appointed for the purpose only of prosecuting and defending actions for that company; that plaintiffs were defendant's attorneys in an action brought against him by the receiver; that they were also attorneys for one Dunn in an action prosecuted against Dunn by the receiver; that they were also attorneys for the several plaintiffs in six different actions in which the investment company was either a party defendant or interested on the side of the defendants; that, while all these actions were pending, the board of directors of the investment company, with the consent of the receiver, adopted a motion authorizing the attorneys of the company to stipulate to dismiss the action against defendant and to abandon further proceedings in the action against Dunn, if the plaintiffs in the six actions in which the company was either a defendant or interested on the side of the defendants, in consideration thereof, would stipulate to dismiss such actions; that plaintiffs were informed of the adoption of this motion soon after it was adopted, but failed to inform defendant thereof; that he did not learn of the adoption of such motion until after the action against him had been tried and had resulted in a large verdict against him; that, by reason of plaintiffs' failure to inform him thereof, he had been deprived of an opportunity to procure a dismissal of the action against him on the merits without expense, and that he was compelled to pay the sum of \$15,000 to compromise and settle the verdict rendered against him.

It is the undoubted duty of an attorney to communicate to his client whatever information he obtains that may affect the interests of his client in respect to the matters entrusted to him. *Rogers v. Gaston*, 43 Minn. 189, 45 N. W. 427; *Baker v. Humphrey*, 101 U. S. 494, 15 L. ed. 1065; 2 R. C. L. 963. And an attorney who is guilty of actual fraud or bad faith in the conduct of his client's business is not entitled to compensation for his services. *Davis v. Swedish Am. Nat. Bank*, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210, 79 Am. St. 400.

Conceding that the plaintiffs ought to have communicated to de-

fendant the information which they had obtained, the answer contains nothing from which we can infer that they were guilty of either fraud or bad faith toward him, or that he sustained any loss by reason of their failure to communicate such information. It is not alleged or claimed that any proposition for a settlement was ever made to them or that they ever had an opportunity to effect a settlement.

It nowhere appears that the plaintiffs, or any of them, in the six actions in which the investment company was either directly or indirectly a defendant, were in any way interested or concerned in the outcome of the suit of the receiver against defendant, or would ever have consented to a dismissal of their own actions or to the making of the stipulation which the investment company authorized its attorneys to make. It does not even appear that the attorneys of the investment company would ever have entered into such a stipulation. Defendant predicates his claim on the fact that plaintiffs had knowledge of the authority given to its attorneys by the investment company and did not communicate that knowledge to him. The facts alleged, if proven, were not sufficient to debar plaintiffs from recovering for their services, or to form the basis of a cause of action against them, and the court correctly excluded the evidence proffered under the second defense.

Order affirmed.

HOLT, J. (dissenting).

I dissent:

In my opinion the evidence offered and excluded, even though insufficient to constitute a counterclaim, should have been received as bearing on the value of the services rendered. What plaintiffs did or omitted to do was material upon that issue.

CHARLES PUSHOR AND ANOTHER v. AMERICAN
RAILWAY EXPRESS COMPANY.¹

June 24, 1921.

No. 22,217.

Finding controlled by specific facts previously found.

1. A finding, in form one of fact but in reality in the nature of a conclusion from specific facts set forth in the preceding findings, is controlled by such specific facts.

Workmen's compensation — parents partially dependent on minor son.

2. Following the construction of subdivision 3, § 8208, G. S. 1913, adopted in *Fleckenstein Brewing Co. v. District Court of Rice County*, 134 Minn. 324, it is held that the parents of a minor son, living with them regularly and giving his wages to his mother to be used in paying the household expenses, are his partial dependents, even though the father's earnings would have been sufficient to maintain the family if they had not been expended in the purchase of the house which it occupied.

Same — interstate common carrier liable for death of servant.

3. The son was accidentally killed while in the employ of an interstate common carrier by express. Held, that there was liability under the workmen's compensation act notwithstanding that fact.

Upon the relation of plaintiffs the supreme court granted its writ of certiorari directed to the district court for Hennepin county and the Honorable Daniel Fish, judge thereof, to review the judgment of that court dismissing proceedings brought under the Workmen's Compensation Act by the parents of Willard C. Pushor, employe, against American Railway Express Company, as employer. Reversed.

Mead & Bryngelson and *A. D. Evans*, for relators.

John W. Gilger and *Milton D. Purdy*, for respondent.

LEES, C.

Certiorari to review a judgment of dismissal in a proceeding under

¹Reported in 183 N. W. 839.

the workmen's compensation act. The trial court found that on October 18, 1918, Willard C. Pushor, then 17 years and 5 months old, was accidentally killed while employed by defendant and engaged in delivering certain commodities shipped from a state other than Minnesota to the Westinghouse Company in Minneapolis. The transportation and delivery of such commodities constituted a transaction in interstate commerce. Plaintiffs are Willard's parents. Their son's weekly wage, at the time of the accident, was \$20. He was living at home and regularly turned over to his mother all his earnings and had done so ever since he began to earn money. She paid his living and personal expenses, and gave him such small sums for his own use as he required. His father, a painter by trade, was regularly employed during the trade season. At other times he found remunerative employment and his earnings were sufficient to support himself and his family and to make payments on a house purchased on contract and fully paid for at the time of the trial. The son's earnings, including occasional sums received from boxing exhibitions, were used by the mother for the ordinary family expenses, to which the father also contributed a part of his income, the remainder being applied to meet payments on the contract for the purchase of the house. The mother owns 160 acres of timbered land in Koochiching county and derives some income from the sale of logs and fuel.

Thus far there is no controversy over the findings, both parties being satisfied with them. The final finding is that Willard's parents were never dependent upon him for their living. This finding is assailed by plaintiffs and was the factor which turned the decision in defendant's favor. Since it is in the nature of a conclusion from specific facts set forth in the preceding findings, we regard it as essentially an inference from and as being controlled by such specific facts. *Wheeler v. Gorman*, 80 Minn. 462, 83 N. W. 442; *Lamberton v. Youmans*, 84 Minn. 109, 86 N. W. 894; *Thomas Peebles & Co. v. Sherman*, 148 Minn. 282, 181 N. W. 715. So regarded, we think it cannot be sustained. The statute in force at the time of Willard's death read thus: "Partial dependents. Any member of a class named in subdivision (3), who regularly derived part of his support from the wages of the deceased workman at the time of his death and for a reasonable

period of time immediately prior thereto shall be considered his partial dependent, and payment of compensation shall be made to such dependents in the order named." Subdivision (3A), section 5, c. 209, p. 290, Laws 1915.

For the purposes of this case the dependents in the order named in subdivision 3 are Willard's mother and father.

The statute was construed and applied in *Fleckenstein Brewing Co. v. District Court of Rice County*, 134 Minn. 324, 159 N. W. 755, where the facts were substantially the same as here. "The test of dependency," said the court, "is not whether" the boy's parents "could support life without the contributions of deceased, but whether they regularly received from his wages part of their income or means of living." It seems to us that the rights of the parties are determined by that case. It was cited with approval in *Milwaukee Basket Co. v. Wiecki*, 173 Wis. 391, 181 N. W. 308, where the facts were almost identical with those in the case at bar. The deceased workman was a 19 year old boy, one of a family of six children who lived with their parents. The father, a younger brother and two sisters were wage earners. A year before the boy's death, the parents had purchased the house where the family lived. During the year \$900, taken from the common earnings of the family, had been paid on the purchase price. The remainder of the earnings was used to support the family. It was held that the boy's parents were partially dependent for their support upon the earnings of their son, and that compensation should be fixed on the basis of the difference between the amount he earned and the amount necessarily taken from the general family purse for his individual care and support. With respect to the payments for the house, the court remarked that they should be considered as part of the necessary support of the family sheltered under its roof and as the equivalent of rent, which, under present day conditions, is so large an item in the household budget.

In *Connors v. Public Service Electric Co.* 89 N. J. Law, 99, 97 Atl. 792, an adult son, living with his parents, gave his weekly wage to his mother. His father, mother and a sister were all wage earners. The court said that, since the earnings of the deceased son went to the general support of the family, it was a legitimate inference that the family was deriving

substantial benefit from the fact that he remained at home and voluntarily gave his wages into the common fund. It was accordingly held that the father, mother and sister were actual dependents of the deceased.

The language of the statute, the conclusion reached in the Fleckenstein case and the views expressed in the Wisconsin and New Jersey cases, are all adverse to defendant's contention that the specific facts found permit the conclusion that Willard's parents were not his partial dependents. We hold that they were such dependents, and that the case should have been disposed of in conformity with the legal conclusion which follows.

2. No point is made of the finding that defendant is a common carrier in interstate commerce of parcels by express. Liability under the Workmen's Compensation Act exists notwithstanding that fact. *State v. District Court of Ramsey County*, 142 Minn. 410, 172 N. W. 310; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 41 Sup. Ct. 93, 65 L. ed. 105.

The judgment is reversed and the case remanded with directions to the district court to proceed to ascertain, compute and determine the compensation payable to plaintiffs under the applicable statutory provisions, as partial dependents of their deceased son.

A. J. McKENZIE v. THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE AGENCY, INC.¹

June 24, 1921.

No. 22,253.

Slander — privileged communication — malice.

1. The conversation in which the slanderous language is alleged to have been used was qualifiedly privileged, and plaintiff failed to prove actual malice.

Same.

2. The fact that the slanderous language was incidentally overheard

¹Reported in 183 N. W. 516.

by persons in an adjoining room, was not such a publication as would remove it from the protection of the privilege.

Action in the district court for Hennepin county to recover \$5,000 for slander. The case was tried before Jelley, J., who at the close of the testimony granted defendant's motion for a directed verdict. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

F. D. Larrabee, for appellant.

Selover, Schultz & Mansfield, for respondent.

TAYLOR, C.

Action for slander in which the trial court directed a verdict for the defendant, and the plaintiff appeals from an order refusing a new trial.

Plaintiff had been in the employ of the Minneapolis branch of the defendant, and shortly after he left their employ defendant claimed that he had overdrawn his account, and sent for him to come to the office. He went to the office and was taken into the private office of Mr. Rogers, the manager of the Minneapolis branch, where he found Mr. Rogers and William J. Burns, the president of the defendant corporation. He charges that, in the controversy that ensued between himself on one side and Mr. Rogers and Mr. Burns on the other concerning his account, Mr. Burns called him a "damn thief." Although Mr. Burns and Mr. Rogers deny that this language was used, there was sufficient evidence on the part of plaintiff to make this issue a question for the jury.

Plaintiff concedes, in effect, that the circumstances were such that the conversation between the parties during this interview, and the communications then made, were qualifiedly privileged. The statement having been made on a privileged occasion, plaintiff could not recover unless he proved actual malice on the part of Burns; that is, that Burns made the statement from ill-will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff. *Peterson v. Steenerson*, 113 Minn. 87, 129 N. W. 147, 31 L.R.A. (N.S.) 674; *Hansen v. Hansen*, 126 Minn. 426, 148 N. W. 457, L.R.A. 1915A, 104; *Froslee v. Lund's State Bank of Vining*, 131 Minn. 435, 155 N. W.

619; *Patmont v. International C. M. Assn.* 142 Minn. 147, 171 N. W. 302.

It seems quite clear that, in consequence of an error of the book-keeper in failing to charge him with a payment previously made, plaintiff had been paid more salary than was actually due him. Burns and Rogers insisted that he should return the overpayment. During the discussion, it appeared from plaintiff's own statement that in his expense account he had charged defendant with larger amounts paid for meals than he actually paid for them. He claimed, however, that he had the right to do this so long as the amounts charged did not exceed the amounts which he was allowed to spend for such purpose. These facts appear from his own testimony. The defamatory language is claimed to have been used during this discussion which, according to plaintiff, became somewhat heated. It took place in the private office of the manager and the only persons present were the plaintiff and Burns and Rogers. Burns and plaintiff were entire strangers, never having met before. We think that plaintiff failed to sustain the burden of proving that, in making the statement, Burns was actuated by ill-will and a malicious motive, or that he made it causelessly and wantonly for the purpose of injuring plaintiff in his feelings or character. It was a remark made on a privileged occasion, to plaintiff himself, during a heated dispute, and there was some foundation for the charge.

There was evidence that the statement was overheard by other employees of defendant in adjoining rooms, but, the conversation being privileged, the fact that it was incidentally overheard by persons in an adjoining room was not a publication of the nature or extent which would remove it from the protection of the privilege. See cases cited in note found in *Ann. Cas.* 1917E, 699; *Hebner v. Great Northern Ry. Co.* 78 Minn. 289, 80 N. W. 1128, 79 Am. St. 387.

Order affirmed.

MARY SPEISS v. ANNA BARBARA SPEISS.¹

June 24, 1921.

No. 22,282.

Cancellation of instrument — no resulting trust — judgment sustained by record.

Plaintiff was the lawful wife and sole heir of George J. Speiss when he died the record owner of the real estate involved in the action. Before his death he had conveyed direct to defendant an undivided one-half thereof by deeds which she recorded after such death. Subsequent to his marriage to plaintiff, he entered a bigamous marriage with defendant and continuously thereafter cohabited with her. The whole of the real estate mentioned, consisting of his homestead in the city and an 80-acre farm, is claimed by each party to the suit. It is *held*:

(1) By virtue of section 6706, G. S. 1913, the absolute title vested in George J. Speiss when the real estate was conveyed to him, even though the purchase price was paid by defendant.

(2) She cannot have a constructive trust or a trust *ex maleficio* declared, for the findings, amply sustained, are that she knew of and acquiesced in the title being taken in the name of George J. Speiss, and that she knew from the start that her relations with Speiss were bigamous.

(3) The burden was on defendant to prove that her money paid for the real estate involved. She did not sustain this burden.

(4) The findings which do not harm, but rather justify, greater relief than appellant otherwise could have, cannot be complained of by her.

(5) The record justifies the judgment rendered.

Action in the district court for Hennepin county to cancel two deeds on the ground that they had been obtained through undue influence and fraud and to have the title to the real estate confirmed in plaintiff. The facts are stated at the beginning of the opinion. The case was tried before Dickinson, J., who found that plaintiff was the lawful wife of George J. Speiss and his sole heir at law; that at the time of his

¹Reported in 183 N. W. 822.

death he was the owner and in possession of an undivided one-half interest in the premises and that defendant was the owner of an undivided one-half interest therein. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

C. C. Joslyn and Charles B. Elliott, for appellant.

Frank H. Morrill and Mead & Bryngelson, for respondent.

HOLT, J.

George J. Speiss died intestate in 1918. It appears that in September, 1881, plaintiff, then 14 years and 8 months old, was married to him. They lived together some six weeks, after which she, because of his failure to support her, was compelled to go to her brother, where in February, 1882, she gave birth to a child. The following June he brought suit to annul the marriage on the ground that she had fraudulently induced him to marry by falsely representing that she was pregnant by him. The action was tried in January, 1884, and terminated in her favor. The parties were never divorced. It cannot be controverted that plaintiff remained the lawful wife of Speiss until his death, and was his sole heir, their child having died before Speiss.

In November, 1883, Speiss was married to defendant, hereinafter designated by the name of Barbara. From that time on until his death these two parties cohabitated as husband and wife. When Speiss died he held the record title to a building on Lake street in Minneapolis, which was then his homestead, also to an 80-acre farm near Robbinsdale. But it appears that Barbara, after his death, placed on record two deeds from him as grantor to her as grantee, conveying an undivided one-half interest to each of said premises. Plaintiff brought this action to cancel these two deeds, on the ground that they had been obtained by undue influence and fraud, and to have the title to the whole of said real estate declared to be in her. Barbara answered, denying plaintiff's title, and, as a counterclaim, alleging that the properties had been bought and paid for by her, and that Speiss, without her knowledge or consent, had fraudulently taken the title to himself; that by threats and cruelty he had coerced her into permitting the title to remain in him without consideration, and, during all their cohabitation, by threats and by false and fraudulent concealments compelled

her against her will and judgment to place her money and property in his possession, and that he had represented himself as a single man at the time she married him, she never knowing to the contrary. She asked that she be decreed the owner of the real estate and that plaintiff has no interest therein. The reply alleged that Speiss and Barbara had settled their property rights subsequent to 1915. The trial resulted in a judgment that plaintiff and Barbara each own an undivided one-half of said premises. Barbara alone appeals.

The findings are vigorously assailed as without support, as made upon issues not presented by the pleadings, and as warranting a different judgment from that ordered. The findings are somewhat exuberant. But it is plain to us that those most severely criticised as beside the issues and unsustained are the ones deemed necessary by the learned trial judge in order to grant Barbara the whole of the relief she did obtain.

The farm was bought for \$10,000 in October, 1907; the full purchase price was paid and the deed delivered to George J. Speiss, as grantee, on November 11, 1907. The home was got in 1910, in a trade for a former home of the parties on Crystal Lake avenue, Minneapolis, \$1,000 being paid in addition. The title to the former home was in George J. Speiss, and he also took title to the one now in controversy. Assuming that Barbara's money paid for all this real estate, the absolute title vested in Speiss under section 6706, G. S. 1913, which is: "When a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance." With the exception of the trust reserved to creditors of the one paying the money by section 6707, the title of the alienee is immune to attack, unless a resulting trust or trust ex maleficio may be declared under section 6708, G. S. 1913, reading: "Section 6706 shall not extend to cases where the alienee named in the conveyance has taken the same as an absolute conveyance in his own name, without the knowledge or consent of the person paying the consideration, or when such alienee, in violation of some trust, has purchased the lands so conveyed with moneys belonging to another person."

Barbara is, no doubt, excluded from predicating any title upon the claim that her money paid for the premises by said section 6706. This statute has often been considered and construed, the last case being *Nelson v. Nelson*, supra, page 285. And our conclusion is that two findings preclude her from asserting any rights to the property under said section 6708. The court found that she knew that the title was placed in Speiss when the deeds were made and acquiesced therein, and that she knew from the start that her relations with Speiss were ligamous and unlawful. We think both findings are sustained. Ever since the parties came to Minneapolis in 1900 or 1901, the bank accounts, with certain exceptions hereinafter noted, were in the name of Speiss, all mortgage loans, and they were many, for he held over 12 unsatisfied mortgages when he died, were to him as mortgagee, and in the deed to every piece of real estate bought in this state by them, or either of them, he was named grantee. In an action brought by her for divorce in 1914, she alleged, in substance, that she knew that he banked and loaned the money in his name and took the title to the land purchased to himself. Of course she averred that her acquiescence was coerced and forced. There is no credible testimony to that effect. On the witness stand she simply denied that she knew that he had taken the deeds in his name.

Nor do we think that Barbara has shown that Speiss took the conveyances in his name in violation of some trust so as to come under the statute, for in this case such contention would have to be based largely upon the claim that he had fraudulently palmed himself off to her as a single man when she married him. In the cases of *Davis v. Cummins* (Mo.) 195 S. W. 752, and *Shrader v. Shrader*, 119 Miss. 526, 81 South. 227, cited by appellant, resulting or constructive trusts were found under which a woman, who had unknowingly contracted a bigamous marriage, was awarded title to land bought with her money and deeded to the one who had deceived her into the marriage by falsely representing himself as single. In each case the court places the decision on the ground that the fraud practised, in representing himself as single when he was not, and then, under the pretense of being her lawful husband, taking advantage of the opportunity to handle her money and take the title, created a constructive trust or a trust *ex maleficio*. Such is not the case here.

We are satisfied of the correctness of the finding that Barbara knew that neither she nor Speiss could lawfully marry when they went through the ceremony. From 1879, when Barbara married Balthasar Huber, until after 1884, she and some of her relatives lived and did business in the immediate neighborhood of where Speiss and his family, and plaintiff and her family resided in Pittsburgh, Pennsylvania. They were all of the same nationality. When Speiss brought his action to annul his marriage to plaintiff, it evidently attracted attention on account of the charges made in the complaint against her father. Barbara admits reading of the trial in the German newspapers. The action was started over a year previous to the time Barbara and Speiss went through the marriage ceremony. She testified that she thought it was another Speiss. But it is significant that they were not married in Pittsburgh, or the county where Pittsburgh is located, but went to Beaver county, and then gave their residence as in Youngstown, Ohio, where neither one had ever lived. Nor can Barbara well plead duped innocence. Her first husband died shortly after the marriage. She then, in 1879, married Balthasar Huber. She thinks he obtained a divorce. There is no credible evidence of that fact. Between the time she married Huber and the time she married Speiss, she married and lost by drowning one Seibert. Shortly after Huber's death, and in 1901 Barbara hurried from California to Pennsylvania to claim and obtain a widow's share in his estate.

Barbara's life work since about 1895 has been fortune telling. It would not be strange that, after such a long practice in duping thousands to take stock in and pay for what she knew to be worthless fibs, she would attempt to deceive the court as well. Her testimony contains inherent improbabilities. It also displays a great deal of shrewdness in evading damaging facts. She may not be entirely at home in the English language, and says she never learned to read or write it, yet her experience has been varied. She has resided in many different states and cities, has traveled extensively, and has had many business transactions in her own behalf, especially prior to 1890. From her living in the same neighborhood as plaintiff, from the evident desire to keep her marriage with Speiss from the records of her place of residence, from her claiming rights as Huber's widow, and from her admit-

ted knowledge of the trial of the marriage annulment case between Speiss and plaintiff, we think the finding warranted that Barbara was aware before she married Speiss of the illegality of the proposed union.

The above disposes of the appeal, without considering whether the money that paid for the property was Barbara's. But we think the finding that that money was the joint property of Speiss and Barbara is not without reasonable support in the evidence. The burden was on Barbara to show that the consideration paid for the home and the farm was hers. We do not think the authority relied on by appellant in *Fogle v. Pindell*, 248 Mo. 65, 154 S. W. 81, is to the contrary, nor is it in point, for in that state is a statute which requires the wife's written consent to the use of her funds by the husband for his use or benefit. The court found that Speiss and Barbara did business upon the understanding, in effect, that they were partners or joint owners to share equally. Their cohabitation being meretricious, their property rights were not affected by any law governing those rights as between husband and wife.

That Speiss, in what he did in respect to the money and property, was not the mere agent of Barbara, is clear. Had he been such a drunkard and spendthrift as she now claims, she certainly would not have selected him as agent. There is no testimony that he ever was requested to account to her as agent for any transaction. The rent from the farm was paid monthly to him, so was the rent for the store located on the homestead, and he collected the interest on the mortgages. There is no pretense that he was requested to turn this over to her or account for it. The same pertains to the bank account. He seems to have deposited, drawn and invested the considerable funds that came to his hands, without let or hindrance from Barbara. It is true that she had accumulated some property and money before they began their relations, and she testified to being worth some twelve or fifteen thousand dollars when they left the east. After that they lived one year in Florida, some time in Indiana, California and other states before coming to Minnesota. She admits he received five acres of her Pennsylvania farm, which he traded for land in Florida, this in turn for property in Ohio and Indiana, and finally the Indiana farm went for a peach orchard in California. The last trade was set aside by

the court for his fraud, and she asserts that the net result of his efforts was nothing at all. And worse, that she was always compelled to support and clothe him and forced to furnish him money for a continuous jag. She says he never earned a dollar. He is not here to deny her assertions, which are so strong as to make them improbable. After they came to Minneapolis, frequent tours were made to other states where she plied her fortune telling. He usually went along. They stayed for months, and she says brought large sums back, sometimes as much as \$8,000. She is silent as to who arranged the trips, who procured the place or rooms for the operations, or who advertised the business. There is positive evidence indicating the correctness of the trial court's conclusion of an understanding to equally share in what was accumulated. Speiss in 1912 opened an account in a savings bank in the name of Barbara in trust for himself, in which account there was over \$5,000 in February, 1918. Another account was opened in 1908, in the name of George J. Speiss, in trust for Barbara, in which there was over \$5,000 on February 8, 1918. It seems that on the last named date he drew \$5,000 out of each account and purchased two liberty bonds of \$5,000 each. There is testimony that he intended one for Barbara and one for himself. Then the deeds executed to Barbara of an undivided one-half of the real estate evidence the carrying out of an agreement to share or divide the accumulations equally.

It is said that the court found that the relations between Speiss and Barbara were confidential, therefore a trust resulted. The finding is not of confidential relations as husband and wife, but in respect to the understanding had between them in their bigamous enterprise that they should share equally in property accumulations. This finding, as well as the one of a division actually carried out in accordance with this understanding, was really essential to award Barbara a share in the home, for, of course, the deed of Speiss thereto, without the signature of his lawful wife, was void. So even if the reply did not sufficiently plead a settlement, it was of no consequence to Barbara. But, that aside, the evidence thereof was properly received on the issue of the ownership of the funds that went into the property, and the finding at any rate was distinctly helpful to Barbara, though not necessary to plaintiff.

In taking leave of the case it may not be amiss to call attention to the unreliability of Barbara, and her case almost entirely hinges upon her testimony. She positively maintained, and had a boon companion verify, the highly improbable story that to pay for the farm she counted out and gave Speiss \$10,000 in paper money, which she had for a long time carried on her person. We think it conclusively appears that this testimony was wilfully and knowingly false. The farm was paid for in November, 1907, when there was a panic threatened. The banks were unwilling to let large sums be withdrawn, and the proof is beyond controversy that the farm was paid for in this manner: George J. Speiss had a bank account of \$900 in one bank which was closed and transferred to the seller of the farm. He had one of \$5,000 in another bank, which had been started in 1904, which was likewise transferred. No money was actually handled or paid to the seller except the \$100 in gold in October, when the contract of the sale was made. Speiss also assigned a note and mortgage of \$1,200, and a mortgage existed on the farm in the sum of \$2,800. Speiss, in closing the deal and receiving the deed, paid over no money to the seller, except perhaps a trifling amount in the adjustment of interest and in the discount of the mortgage. So upon a very vital point Barbara was knowingly wrong.

We think defendant Barbara has no reason to complain of the judgment. She perhaps has fared better than the record really justifies, were it not for the findings which appellant finds fault with as being outside of the issues of the pleadings before the amendment ordered by the court.

Judgment affirmed.

STATE EX REL. CARL U. NELSON v. BOARD OF PUBLIC
WELFARE OF THE CITY OF MINNEAPOLIS
AND OTHERS.¹

June 24, 1921.

No. 22,295.

Municipal corporation — discharge of employe — Civil Service Act.

1. The civil service act, which applies to the city of Minneapolis, permits the officer or board that appointed an employe to discharge him, without referring the matter to the civil service commission for a hearing, unless he has been in continuous employment for six months or more.

Discharge by Board of Public Welfare of Minneapolis.

2. The act creating the Board of Public Welfare of the city of Minneapolis authorized the board to discharge the employes of former departments, transferred to it, without a hearing, and, insofar as this act is inconsistent with the civil service act it supersedes that act.

Second discharge without a hearing, when.

3. Where an employe so discharged was subsequently appointed to a different position, he may be discharged therefrom by the board without a hearing before the civil service commission, unless he has served under such new appointment for six months or more.

Honorably discharged soldier entitled to hearing before Board of Public Welfare.

4. The relator, being an honorably discharged soldier, was entitled to a hearing before being discharged from his position, but, as this right was not given him by the civil service act, but by the act granting preference rights to honorably discharged soldiers and sailors, and that act did not designate what tribunal should hold such hearing, the duty to hold it devolved upon the board of public welfare which appointed him, and not upon the civil service commission.

Voluntary appearance waived a formal notice of hearing.

5. By voluntarily appearing before the board and informing them that he had nothing further to present, the relator waived formal notice of the hearing.

¹Reported in 183 N. W. 521.

Concession at argument corrects omission in record.

6. While the return fails to show that the relator was an honorably discharged soldier, it was conceded at the argument that such was the fact.

Upon the relation of Carl U. Nelson the district court of Hennepin county granted its writ of certiorari directed to the Board of Public Welfare of the City of Minneapolis to review the action of that board in discharging relator from the position of inspector of foods. The matter was heard by Dickinson, J., who granted respondents' motion to quash the writ. From the judgment entered quashing the writ, relator appealed. Affirmed.

Neil M. Cronin and Orren E. Safford, for relator.

C. D. Gould, W. G. Compton, and L. B. Byard, for respondents.

TAYLOR, C.

Alleging that he had been wrongfully discharged, on August 10, 1920, by the Board of Public Welfare of the city of Minneapolis from the position of inspector of foods in the division of public health, the relator sued out a writ of certiorari from the district court to review the action of the board. On the return made to the court in obedience to the writ, the court rendered judgment affirming the action of the board as lawful and valid and discharging the writ. The relator appealed from this judgment.

The Board of Public Welfare of the city of Minneapolis was created by chapter 327, p. 342, of the Laws of 1919, and on July 1, 1919, the powers and duties theretofore exercised and performed by the department of health and by several other departments and boards of the city were transferred to, vested in, and imposed upon, this board. Among other things the act provided that: "All officers and employes of the department of health * * * shall be eligible to similar offices and positions under the board of public welfare hereby created without being required to take civil service examinations as to their qualifications therefor, and they shall continue in their respective offices or positions from the time this act goes into effect, until further action of the board." Section 6.

From the return it appears that on June 8, 1920, the committee on public health of the board of public welfare reported to the board three lists of employees in the division of public health, and as to one of these lists recommended: "That this personnel of employees carried over as employees prior to July 1st, 1919, be not certified and that the positions now occupied by them be declared vacant June 15th, 1920, and that the commissioner of health be authorized to request the civil service commission to replace them."

This list included the relator, who was named therein as inspector of milk. The recommendation of the committee was adopted by the board. The committee also recommended that the employees in this list be given a leave of absence with pay for one week from June 15, 1920, and this recommendation was also adopted by the board. About this time, the date is not given, the board requested the civil service commission to certify an eligible person for appointment as inspector of foods in the division of public health, and on June 18, 1920, the commission certified to the board the name of the relator, and he was appointed to that position on June 23, 1920. On July 27, 1920, the commissioner of public health gave him a written notice that, pending the action of the board of public welfare, he was suspended without pay for absence from duty without authority and for falsification of reports, and, pursuant to the rules of the board, reported this action to the committee on public health. This committee reported to the board at its meeting of August 3, 1920, recommending that the relator be discharged. He appeared at this meeting and was informed by the chairman that the committee, after investigation, had recommended that he be permanently discharged, and was further informed that it had been made to appear that the statement in his written report of July 26, that he had been engaged during all the working hours of that day in performing the duties assigned to him, was false in that during those hours he had attended a hearing held by a committee of the city council which his duties did not require him to attend, and was further informed that the board desired to hear him in his own behalf and to give him such opportunity as he wished to present such facts and evidence as he desired before the board took action on the recommendation

for his discharge. Thereupon the relator stated to the board that he had been absent from duty without leave as stated by the chairman, and that: "Said written inspection report made by him was false in that he was not wholly employed * * * on the said July 26, 1920, in and about his regular duties." He further stated that he "did not think or realize that he had been guilty of any act in grave violation of his duties and that he had nothing further to say and present to the board at said hearing."

No action was taken by the board at this meeting. At the next meeting, held August 10, 1920, a motion to refer the matter to the civil service commission was defeated, and the board then, by formal vote, adopted the recommendation of the committee to discharge the relator. At the meeting of the board, held August 24, 1920, the relator made a written demand to be reinstated, on the ground that the action of the board was in violation of the civil service laws and of the law giving preference rights to honorably discharged soldiers, and on the further ground that he had been given no notice of the charges and no opportunity to meet them. In this demand he stated that he was an honorably discharged soldier from the army of the United States in the world war. So far as the return discloses, no action was taken by the board on this demand.

The relator rests his appeal on the proposition that the board of public welfare lacked power to discharge him and that he could be discharged only by the civil service commission.

Chapter 63, p. 70, of the Laws of 1917, established a civil service commission for the city of Minneapolis and divided the officers and employes of the city into two divisions, designated as the "Classified Service" and the "Unclassified Service." The commission was required to prepare and keep a register of all employes of the city in the classified service; to classify and grade the different offices and positions according to the duties to be performed; to hold public competitive examinations to test the relative fitness of applicants, and to keep a register of those found eligible to appointment to positions in the various grades. The act provides that when a vacancy is to be filled the appointing officer shall notify the commission, and the commission shall certify the highest name from the appropriate list of the eligible regis-

ter, and that all vacancies shall be filled from the names so certified. There are several exceptions not necessary to mention here. The act provides in section 11 that: "No officer or employe after six months continuous employment shall be removed or discharged except for cause, upon written charges, and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission or by or before some officer or board appointed by said commission to conduct such investigation."

The relator contends that he is within the protection of this statute. He concedes that under this act the employing officer or board may dismiss an employe without the hearing above provided for, unless the employe has been in continuous service for more than six months, but insists that he had been in continuous service for more than that period.

The act creating the board of public welfare provided for reorganizing and consolidating several departments and boards of the city under this board, and abolished such former departments and boards. It provided that "the terms of office and employment of all officers and employes of said departments and boards herein abolished shall terminate and no longer continue except as herein otherwise expressly provided." Section 9. It provided that officers and employes of the former departments and boards should be eligible to similar offices and positions under the board of public welfare, without taking civil service examinations, and that they should "continue in their respective offices or positions from the time this act goes into effect until further action of the board." Section 6. It provided that the board should have power to determine the number of employes in each division under its control; that the head of each division should have power to appoint, subject to confirmation by the board, all subordinate employes in his division; and that all employes of the board, other than the commissioner of health, shall be included in the classified service of the city "and their appointment, employment, suspension and discharge shall be made under and pursuant to the provisions of" the civil service act. Section 5.

The act terminated the employment of former employes, except as otherwise expressly provided therein. It was provided therein that

such employes should continue in, their respective positions, until the further action of the board. The board was given power to appoint its own employes, either directly or through the heads of divisions, but could only appoint former employes or persons certified to it by the civil service commission.

Insofar as they are inconsistent, the provisions of this act supersede those of the civil service act, and we think that the board, in determining to accept and appoint as its own employes certain employes of the former departments, and to dismiss certain other employes of such former departments, acted within the authority conferred upon it. The relator was among the employes of the former department of health who were thus dismissed. He acquiesced in this dismissal and accepted an appointment to another position to which he had been certified by the civil service commission. This was a new appointment to a different position, and, in view of the action of the board terminating his former service and his acquiescence therein, cannot be considered as a continuation of that service. Consequently, so far as the civil service act is concerned, the board had the unquestioned right to discharge him from this new position at the time they undertook to do so.

But the relator contends that under chapter 192, p. 194, of the Laws of 1919, which provides that no honorably discharged soldier holding a position "in the state of Minnesota or in the several counties, cities or towns thereof * * * shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges," he was entitled to a hearing, although his period of service was less than six months, and that the power to hold that hearing was vested in the civil service commission and could not be exercised by the board of public welfare.

The civil service act confers the power and imposes the duty on the civil service commission to hold, or to appoint an officer or board to hold, the hearings provided for by that law, but confers no power and imposes no duty on that body in respect to hearings required by any other law. The relator had not been in continuous employment a sufficient length of time to entitle him to a hearing under the civil service law, and the provisions of that act relating to hearings and the discharge of employes have no application to the present case. The act giving

preference rights to honorably discharged soldiers, gave the relator the right to a hearing, but did not specify what officer or board should hold that hearing. It is well settled that the power to discharge an employe rests in the officer or board that appointed him, unless that power has been taken away by some express statute. *State v. Wunderlich*, 144 Minn. 368, 175 N. W. 677; 2 Dunnell, Minn. Dig. § 8010. It is also well settled that where an officer or employe is entitled to a hearing before he can be removed or discharged, such hearing is to be held by the officer or board possessing the power of removal in the absence of a statute providing otherwise. We find no statute taking from the board of public welfare the power to hold the hearing accorded the relator by the soldiers preference act, and concur in the conclusion reached by the lower court that that board had authority to hold such hearing and that its action was legal and valid.

The relator raises some question as to the sufficiency of the notice given him. He appeared before the board and was offered whatever opportunity he desired to present facts and evidence; he made his statement and then informed the board that he had nothing more to present at the hearing. This conduct operated as a waiver of formal notice of the hearing.

We note that there is nothing in the return showing that the relator was an honorably discharged soldier, except his assertion to that effect in his demand for reinstatement made two weeks after he had been discharged. But from the statements of counsel at the argument, we have taken it for granted that he was an honorably discharged soldier, and that the board knew that fact at the time they discharged him.

Our examination of the return satisfies us that the district court disposed of the case correctly and its judgment is affirmed.

LOUISA GUMMISON v. S. M. JOHNSON.¹

June 24, 1921.

No. 22,296.

Vacating judgment — answer not a defense.

1. The proposed answer did not show a defense, and the motion to open the default judgment was properly denied.

Husband and wife — resulting trust — fraud.

2. Where the husband's earnings pay for land, but the title is taken in the wife's name, she becomes the absolute owner under section 6706, G. S. 1913, and no resulting trust or trust ex maleficio can be declared under section 6708, G. S. 1913, when it appears that the title was so taken with his knowledge and acquiescence, and the only fraud charged against her was misrepresentations as to the law bearing upon the property rights of husband and wife.

Community property not recognized in Minnesota.

3. The community property doctrine as to accumulations of husband and wife does not exist in this state.

Action in ejectment in the district court for Douglas county, and to recover \$100 damages for withholding the premises. The case was tried before Parsons, J., who made findings and ordered judgment in favor of plaintiff. From an order denying his motion to open the judgment and for leave to defend, defendant appealed. Affirmed.

H. Zander, for appellant.

Gunderson & Leach, for respondent.

HOLT, J.

The parties were married in 1885. In 1896 they bought a small farm for a home, in Douglas county, the title being placed in plaintiff. They had no children. In 1907 plaintiff sued for divorce on the ground of cruelty, but was defeated. She then appears to have moved to North Dakota, where two actions for the same purpose were brought, both

¹Reported in 183 N. W. 515.

being dismissed on the merits. Thereafter she acquired a residence in Montana, and there sued for divorce, alleging sufficient cause under the laws of that state. Defendant again employed attorneys who answered, but, having neglected to comply with an order of the court directing him to pay temporary alimony and attorneys' fees, the answer was stricken and the divorce granted. Some time afterwards she brought this action to eject defendant, who had always maintained his home upon the farm. He defaulted, judgment was entered, and when, some six months thereafter, execution issued he moved to open the judgment and for leave to defend. The motion was denied and he appeals.

An affirmance could well be rested on the ground that the action of the court below shows no abuse of judicial discretion. However, since the learned trial court has made it appear that, had the proposed answer disclosed a possible defense, the motion ought to have been granted, we shall consider the appeal from that view point.

The substance of the proposed answer is that, from the time of the marriage, defendant alone earned whatever was used for the family support and whatever was saved, all his earnings being turned over to plaintiff; that out of the earnings and savings of defendant the farm was bought, paid for and improved; that plaintiff fraudulently, without defendant's knowledge or consent, caused the title to be placed in her name, but that he had always had it in his possession and control as his homestead. Then come averments which take away the effect of the charge that defendant did not know of or consent to the title being so placed, in this: It is alleged that plaintiff deceived defendant by her false promises and representations that it made no difference between them in whose name the legal title was, inasmuch as they were husband and wife, "and what belongs to one belongs also to the other, and one could not sell or dispose of the property without the consent or signature of the other, and that they had equal rights in the premises; that the defendant thereafter on several occasions had requested the plaintiff to add the defendant's name to the deed and that the title of said premises should be in both the plaintiff and defendant, but that the plaintiff has at all times, by her promises that the property was the defendant's, and that the legal title did not and should not affect their rights therein and misrepresentations of her love and faithfulness

to her marriage vows, deceived this defendant into believing her promises and representations to be true, and by her superior knowledge and dominating disposition, and by her threats and quarrels has at all times refused and refrained from transferring the legal title to the defendant, until the plaintiff by falsehood, fraud and misrepresentation and deceit was granted a divorce from the defendant."

The quoted allegations clearly admit that defendant was never ignorant of the fact that plaintiff held the title. The fraudulent representations relate merely to her opinion as to the legal status of the parties in respect to the farm. This hardly suffices as a legal ground for declaring a trust *ex maleficio*; at most, it was misrepresentation as to what the law was by one who, to defendant's knowledge, knew no more law than he did.

It is also true that, but for the divorce, defendant's use and possession of the homestead could not have been disturbed. The fraud alleged against plaintiff in procuring the divorce is not available to defendant as a defense. His failure, after answering therein to comply with the order of the court, prevented a defense, and makes the decree of the Montana court conclusive on him that she had just cause for an absolute divorce. The jurisdiction of that court cannot be questioned. So far as that decree bears on the marriage status of the parties, it is binding in this state. *Thurston v. Thurston*, 58 Minn. 279, 59 N. W. 1017. And while it could not affect their rights in or to real estate here situate, it did terminate all rights which defendant as a husband had in her property. It cut off absolutely his homestead right to any of her real estate.

By section 6706, G. S. 1913, the absolute title vested in plaintiff, though the defendant paid for the farm, for it appears that the conveyance was made to her. Defendant's proposed answer does not place him in position to attack her title under section 6708, G. S. 1913, because, as stated, it discloses that he had knowledge of the fact that the title was in her and acquiesced therein, and it does not state facts showing that the title was so taken in her name in violation of any trust or through legal fraud.

The main argument of defendant is based on decisions from states having enacted statutes declaring property acquired by joint savings

or earnings of husband and wife to be community property. Such authorities cannot assist us, and it is useless to discuss them, for we have no statute of that sort, and the community property rule has never obtained in this state.

It is to be regretted that defendant's failure to contest the Montana divorce action has resulted in ousting him in old age from the home his labor secured. Especially is this so because, reading between the lines, there arises a well founded suspicion that plaintiff had really no cause for a divorce, but by her persistence in its pursuit so discouraged or impoverished defendant that he failed and neglected to continue his defense.

Order affirmed.

THEODORE WETMORE v. J. B. HUDSON.¹

June 24, 1921.

No. 22,308.

Broker — verdict for defendant sustained.

1. Action by a real estate broker to recover compensation for procuring a purchaser for real estate. *Held*, that the evidence justified a verdict in favor of the defendant.

Telephone conversation admissible in evidence.

2. A conversation over a telephone is admissible in evidence, since, when one person in the usual manner calls another by phone, and the person who answers assumes to act, the rebuttable presumption arises that he was the person called whom he assumes to be.

Charge to jury.

3. The charge of the trial court considered and *held*, that it was not argumentative as contended for by appellant, but it submitted the issues clearly and fairly to the jury.

Revocation of authority — question for jury.

4. Whether appellant's authority was revoked by a sale made through another broker before appellant produced a purchaser, was properly submitted to the jury.

¹Reported in 183 N. W. 672.

Action in the district court for Hennepin county to recover \$1,500 as commission on sale of real estate. The case was tried before Fish, J., and a jury which returned a verdict in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

John F. Bernhagen, for appellant.

Cobb, Wheelwright & Benson and *R. A. Scallen*, for respondent.

QUINN, J.

The parties to this action entered into an oral agreement in the summer of 1919, whereby plaintiff was to find and produce a buyer for the lot described in the complaint, which defendant owned, at the price of \$66,000, payable as follows: At least \$15,000 at the time of sale, and the balance in instalments of \$5,000 per year with interest at the rate of 6 per cent per annum. For his services therefor defendant was to pay him the sum of \$1,500.

It is conceded that such a contract was entered into between the parties, but they differ materially as to some of the conditions thereof. It is the claim of plaintiff that he was given the exclusive right to procure a purchaser for the lot, and that the time therefor was unlimited. The defendant insists that plaintiff was not given the exclusive sale of the lot, and that it was agreed and understood between them that plaintiff was to produce such purchaser within one week; that he failed to do so, and that the lot was thereafter sold through another agent before plaintiff had produced any purchaser therefor. The cause was tried to a jury and a verdict returned in favor of defendant. From an order denying his motion for a new trial, plaintiff appealed.

The chief contentions on behalf of appellant are: First, that the verdict is not justified by the evidence and is contrary to law; second, that it was error to admit the testimony of the witness Mary Mondell as to a conversation over the telephone relative to the matters in issue upon the ground that no sufficient foundation was laid; third, that the charge of the court was argumentative and that it submitted the issues to the jury in a manner prejudicial to the rights of the plaintiff, and

fourth, that it was error to submit to the jury whether plaintiff's authority was revoked by a sale of the property by another broker.

A reading of the record discloses a sharp conflict in the testimony upon the issues in dispute. The plaintiff offered testimony tending to show that he was given the exclusive sale of the lot, and that he was to be paid \$1,500 when he sold it or produced a purchaser ready and willing to buy the same upon the terms stated, and that he did so furnish and produce such a purchaser in the person of Fred B. Whitcomb on August 20 or 23, 1919. Had the jury adopted the foregoing as the true theory of the controversy, plaintiff would certainly have been entitled to recover. But the defendant offered testimony tending to show that, under the agreement, plaintiff did not have the exclusive sale of the lot, and that, to entitle him to his commission, he was required to produce a purchaser within a week from the date of their agreement, that he failed so to do and that, in the meantime, the lot was sold to Whitcomb through a different agency, before plaintiff had informed defendant that Whitcomb was his prospective customer. The issues thus presented were fully, correctly and we think fairly, submitted to the jury by the learned trial judge, and by its verdict determined in favor of defendant. There was ample evidence to sustain the verdict.

Upon the trial appellant testified that, at different times prior to August 23, he talked over the telephone with a young woman in defendant's employ relative to the sale of the property. The witness Mary Mondell was called by defendant and interrogated as to conversations with plaintiff over the telephone concerning the transaction, which was objected to on the ground that no foundation had been laid therefor. She testified that she had been in defendant's employ about four years, during which time she assisted him by taking messages over the telephone; that she remembered having several conversations over the telephone relative to the transaction under consideration; that she did not know plaintiff's voice; that defendant stood or sat by her side during these conversations and dictated what she should say. In response to a question by counsel for plaintiff the witness testified: "Q. You don't know Mr. Wetmore's voice, do you? A. Why, the same voice several times. I never met Mr. Wetmore before, only he would say, 'It is Mr. Wetmore speaking.' Q. You had never talked to him before that over

the telephone? A. No." Under these circumstances we think the foundation was sufficient to justify the admission of the testimony. A conversation over a telephone is admissible in evidence, since, when one person in the usual manner calls another by phone and the person who answers assumes to act, the rebuttable presumption arises that he was the person called whom he assumes to be. *Thiesen v. Detroit Taxicab & Transfer Co.* 200 Mich. 136, 166 N. W. 901, L.R.A. 1918D, 715; *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245, 127 Am. St. 531.

We discover no error in the submission of the proposition whether appellant's authority was revoked by a sale through a different agent before he produced a purchaser. Unless the appellant had the exclusive sale of the property, a sale thereof by the defendant through a different agent would terminate appellant's authority. An owner has a right to place his property for sale with more than one broker, and, where a broker undertakes to sell property under such circumstances, he takes his chances of producing a purchaser in advance of his competitor. And if he fails in his effort it is a loss incident to the business and he would not be entitled to recover a commission. *Ahern v. Baker*, 34 Minn. 98, 24 N. W. 341; *White & Hoskins v. Benton*, 121 Iowa, 354, 96 N. W. 876. We find no error in the manner of the submission of this issue under the pleadings and proofs.

Affirmed.

IN THE MATTER OF PROCEEDINGS TO ENFORCE PAY-
MENT OF TAXES ON REAL ESTATE REMAINING
DELINQUENT ON THE FIRST MONDAY IN JANUARY,
1920, FOR THE COUNTY OF RAMSEY, STATE OF
MINNESOTA.

JOHN E. STRYKER, OBJECTOR.¹

June 24, 1921.

No. 22,335.

Taxation — rate of assessment — case limited.

The land involved in this proceeding, though within the boundaries

¹Reported in 183 N. W. 671.

of the city of St. Paul, but in the outskirts thereof and unplatted, held assessable for taxation under G. S. 1913, § 1988, at 33½ per cent of its true value. *State v. Minn. Tax Commission*, 135 Minn. 205, limited.

In the above entitled matter the owner filed objections in the district court for Ramsey county. The matter was heard by Michael, J., who made findings sustaining his objections and ordered that the assessment on the real estate be reduced from 40 to 33½ per cent of its value, and reduced the tax in accordance therewith. The motion of the state to amend the findings was denied. From the order denying its motion for a new trial, the state appealed. Affirmed.

Egbert S. Oakley, Assistant Attorney General, *Richard D. O'Brien*, County Attorney, and *Harry H. Peterson*, Assistant County Attorney, for the state.

John E. Stryker, pro se.

BROWN, C. J.

The sole question presented in this proceeding is whether the real property involved should be assessed for taxation under the provisions of G. S. 1913, § 1988, as urban platted property and at 40 per cent of its true value, or as unplatted and at 33½ per cent of such value, within the meaning of the statute as construed and applied in *State ex rel. Chase v. Minn. Tax Commission*, 135 Minn. 205, 160 N. W. 498. The trial court held that it belonged to the suburban class, to be taxed accordingly. The state appealed from an order denying a new trial.

The facts are not in dispute. The property in question, a tract of about 9 acres, lies within the municipal boundaries of the city of St. Paul, at the southwest corner thereof a mile or so north of Fort Snelling. It is unplatted and is entirely surrounded by unplatted land. The territory adjoining is sparsely settled, only two or three dwellings being within a half or three quarters of a mile. Defendant has a dwelling and other suitable buildings thereon and it constitutes his home. He keeps a cow and a horse and some chickens. Part of the land is set apart as a pasture for the cow, the balance, except that which is occupied as a site for the buildings, is devoted to gardening, corn, potatoes

and other vegetables being raised, producing feed for the horse, cow and chickens, and vegetables enough to supply the household for the year. The land is located some 6 miles from the center of the city activities, has no city water, sewer, sidewalks, lights or police protection, such as is afforded and supplied to the built-up parts of the city. In short the land stands isolated from all city advantages, is not urban either in character or use, beyond the fact that the building thereon is occupied as a residence, and the land is devoted generally to such purposes as similarly situated unplatted suburban land naturally is adapted.

On these facts, which as stated are not in dispute, we conclude that the rule of the Chase case does not apply. The facts in the two cases are essentially different. The decision of the trial court should therefore be sustained. We do not think the value of the property in controversies of the kind should be given any special significance or effect. Being unplatted in fact, the question whether the land is taxable as platted property must be determined from considerations similar to those controlling the decision in the Chase case, which should not be extended to facts like those at bar.

Order affirmed.

INTEGRITY MUTUAL CASUALTY COMPANY OF CHICAGO
v. JOHN NELSON.¹

June 24, 1921.

No. 22,408.

Workmen's Compensation Act — settlement not open to readjustment, when.

1. A lump sum settlement in proceedings under the Workmen's Compensation Act, entered into by the parties under the provisions of G. S. 1913, §§ 8216 and 8222, approved by the trial court and formally confirmed by its judgment, and paid by the employer, in the absence of fraud or deception, is final and not open to readjustment.

¹Reported in 183 N. W. 837.

Same — court without jurisdiction.

2. It was within the power of the legislature to declare such settlements final, and when not challenged for fraud the courts are without authority, inherent or otherwise, to nullify the legislative declaration to that effect.

Statute inapplicable — case distinguished.

3. The mistakes and amendment statute, G. S. 1913, § 7786, is inapplicable. *State v. District Court of Rice County*, 134 Minn. 189, is distinguishable in that it did not involve a lump sum settlement.

Proceeding under the Workmen's Compensation Act. The history of the case will be found at the beginning of the opinion. Upon the relation of defendant, the supreme court granted its writ of certiorari directed to the district court for Wabasha county and the Honorable Charles E. Callaghan, one of the judges thereof, to review the order denying relator's motion to vacate and open the settlement made by the parties thereto and vacating and opening the judgment confirming that settlement. **Affirmed.**

Erling Swenson, for relator.

M. C. Tift, for respondent.

BROWN, C. J.

Defendant was in the employ of the Omaha Structural Steel Bridge Company, a corporation, and claims to have received, while in the course of his employment on April 23, 1918, an injury, for which compensation was due him under the Workmen's Compensation Act. He made no claim thereto until the commencement of this suit by the surety for the employer on March 31, 1919, to determine whether he was injured, and, if so, the compensation to which he was entitled under the law; he then interposed his claim. The action was commenced in Wabasha county, wherein the injury was received, if at all, and defendant, then a patient in a hospital in the city of Minneapolis, through his attorney made application for a change of venue to Hennepin county. The application was denied. *State v. District Court of Wabasha County*, 142 Minn. 503, 172 N. W. 486. He then moved for a change of venue on the ground of convenience of witnesses and that was also denied. In July, 1919, following, the cause came before the

court for trial, whereupon the parties entered into a settlement and adjustment of the controversy, by which the lump sum \$750 was agreed upon in full compensation for defendant's injuries. Defendant was represented by his present attorney. The settlement was formally approved by the court, judgment was entered accordingly and the amount thereof paid to defendant. Thereafter in July, 1920, a little less than a year from the date of the judgment so approving the settlement, defendant made application to the court to vacate the settlement and for a retrial and further inquiry into the question of the extent of his injuries, and for a readjustment of his compensation. The application was based on "the ground of newly discovered evidence unknown to defendant at the time of the settlement, and on the further ground that defendant was compelled to enter into the settlement because of the prohibitive cost and expense of trying his claim in court, and on the further ground that the amount received in settlement was clearly inadequate to compensate for his injuries, and that manifest wrong has been done him."

The record presents two questions, namely: (1) Whether the lump sum settlement, approved by the trial court, and paid by the employer, is under the compensation act final and not open to readjustment; and, if not final, (2) whether the trial court abused its discretion in denying the application.

The first question must be answered in the affirmative, and, as that disposes of the case and results in an affirmance of the order under review, special consideration of the second question becomes unnecessary.

G. S. 1913, § 8216, provides that the parties concerned may settle all controversies arising under the compensation act from injuries to employees, subject to the approval of the court, and for judgment in harmony with the terms of their agreement, and, by section 8221, that all such agreements, where the amount agreed upon does not exceed compensation for six months' disability, shall be final and not subject to readjustment; all awards by the court within the same limitation as to amount are likewise made final. This applies to settlements and awards providing for periodical payments, invalid unless approved by the court. In *re Clarkson v. Northwestern Con. Milling Co.* 145 Minn. 189, 175 N. W. 997, 176 N. W. 960. Section 8222 treats of lump sum set-

tlements, and awards payable periodically for periods exceeding six months, and the lump sum settlement is there made final, while relief from an award exceeding six months' disability payable periodically is open to readjustment on the grounds therein specified. The statute reads: "All amounts paid by employer and received by the employee or his dependents, by lump sum payment, shall be final; but the amount of any award payable periodically for more than six (6) months may be modified" as herein provided.

The statute seems quite clear in expression and purpose and will admit of but one construction, and that to the effect that the law-making body intended the particular settlement to end finally matters so adjusted. The finality feature was no doubt made a part of the statute, in encouragement of settlements in the expectation that payment of compensation would promptly reach the injured workman, and the delay usually incident to the litigated controversy be thus avoided. That has been the general understanding of the statute for several years. In fact soon after the passage of the act the state labor commissioner who, by section 8229 thereof, is charged with the duty of advising laborers of their rights under the law, applied to the attorney general of the state for a construction of this particular section. That office gave out the opinion that settlements of the kind are final and not subject to readjustment. The opinion, no doubt sound, has at all times since been acted upon as correct interpretation of the statute. Bulletin No. 9, Opinions of Attorney General to Labor Department, page 8. The question was not presented in *State v. District Court of Rice County*, 134 Minn. 189, 158 N. W. 825, a lump sum settlement not being there involved.

The question requires no further discussion. It was within the power of the legislature to make such settlements final, and the courts are without authority, inherent or otherwise, to nullify the legislative declaration to that effect, except for fraud or deception of a character to entitle the complaining party to relief. *Baart v. Martin*, 99 Minn. 197, 108 N. W. 945, 116 Am. St. 394; *Murphy v. Borgen*, 148 Minn. 375, 182 N. W. 449. But no fraud is here claimed. Defendant had the advice of able counsel in the matter, and there is no suggestion of overreaching by the employer or the insurance company charged with

the payment of the claim. Errors of the court or of the clerk in the entry of the judgment in approval of the settlement, may of course be corrected by the court as in other cases. But G. S. 1913, § 7786, insofar as it grants to the court authority in its discretion to relieve a party from his mistakes and excusable neglect, has no application to the lump sum settlement entered into under the compensation act. *Murphy v. Borgen*, *supra*.

Order affirmed.

HALLAM, J. (concurring in result).

I concur in the result, but I do not agree that the compensation act has taken from the court its inherent power to relieve against its own judgments taken through mistake, surprise or excusable neglect. This power was not granted, but only limited by G. S. 1913, § 7786. *Gerish v. Johnson*, 5 Minn. 10 (23); *Russell v. Blakeman*, 40 Minn. 463, 42 N. W. 391; *Waller v. Waller*, 102 Minn. 405, 113 N. W. 1013.

I find nothing in the compensation act which, in my judgment, deprives the court of this salutary inherent power. In fact section 8216 provides in terms that judgments entered on settlement of the parties "shall have the same force and effect * * * as other judgments of the same court." The provisions of section 8221 that all settlements by agreement of the parties and all awards made by the court of compensation for disability of six months or less shall be "final and not subject to readjustment," and the provision of section 8222 that all amounts paid by the employer by lump sum payment shall be final, but the amount of any award payable periodically for more than six months may be modified by agreement, or by the court on application based on increase or decrease of capacity occurring since the award was made (*State v. District Court of Hennepin County*, 136 Minn. 147, 161 N. W. 391), destroy judgments for periodical payments of finality, but merely place lump sum judgments on the same footing as other judgments of the court, which are commonly spoken of as "final." *State v. Probate Court of Ramsey County*, 83 Minn. 58, 60, 85 N. W. 917. The term "final" is used in contradistinction to the term "subject to readjustment."

IN THE MATTER OF THE ESTATE OF ELBERT D.
MELDRUM, DECEASED.¹

June 24, 1921.

No. 22,451.

Will — construction of devise.

1. Devise by testator to his wife of all his property for life, with power to sell and convey as she may think best, without accounting to the court for the proceeds, remainder to their daughter, does not convey a fee to the life tenant, but only the naked power to dispose of the fee.

Vesting of title under devise — inheritance tax.

2. Where testator devised all his property to his wife for life, remainder to their daughter, the title vests at the death of the testator, and the probate court in the first instance correctly determined the value of the legacy to each of the legatees for the purpose of inheritance taxation under section 2272, G. S. 1913, as amended by chapter 410, Laws of 1919.

Upon the relation of Grace D. Meldrum the supreme court granted its writ of certiorari directed to the probate court for Norman county and the Honorable Oscar H. Bakke, judge thereof, to review proceedings in that court determining the amount of inheritance tax due to the state from relator on account of her share in decedent's estate. Remanded with directions.

C. S. Marden and Douglas, Kennedy & Kennedy, for relator.

Clifford L. Hilton, Attorney General, and *Egbert S. Oakley, Assistant Attorney General*, for the state.

QUINN, J.

Certiorari to review the proceedings of the probate court of Norman county in the above entitled matter.

Elbert D. Meldrum executed his last will and testament on July 23,

¹Reported in 183 N. W. 835.

1914. He died on May 12, 1920, leaving him surviving his wife, Grace D. Meldrum, and their daughter, Claribel M. Metzger, as his sole heirs. At that time he owned certain real estate and personal property situated in Norman county, Minnesota, valued at \$106,177.56. The amount of claims, expenses of administration, etc. aggregated \$4,184.09, leaving a net estate in Minnesota of \$101,993.47 for distribution. The will was duly presented, proved and admitted to probate in Norman county. The estate consisted of a farm valued at \$96,400, and its equipment. The here material portion of the will reads as follows:

"Second: After the payment of said funeral expenses and debts, I give, devise and bequeath unto my beloved wife, Grace D. Meldrum all of my property, both real and personal, wherever the same may be located and the rents, issues and profits thereof, for and during the term of her natural life.

"Third: After the decease of my beloved wife, Grace D. Meldrum, I give, devise and bequeath the remainder of my estate, real, personal and mixed, wheresoever it may be found and whatsoever it may consist of, to my daughter, Claribel Metzger, her heirs and assigns forever.

"Fourth: It is my further will and pleasure that if, during the lifetime of my wife, Grace D. Meldrum, if she shall survive me, it becomes necessary to encumber any of my property, or if my wife, Grace D. Meldrum, deems it to her best interest to sell and dispose of any or all of my said property, that she may mortgage and encumber said property as she deems to her best interest, and she may sell any and all of the real or personal estate at public or private sale as she may think best, without being compelled to account to the Probate Court or any other court for the proceeds of said property."

It is contended on behalf of relator that the will devised and bequeathed to her a life estate in all of the property, including the use and profits thereof, remainder to the daughter, Claribel M. Metzger, subject to such life estate, possession thereof to be given her upon the death of her mother, and that each of said estates vested upon the death of the testator.

On April 20, 1921, the probate court, in determining the amount of inheritance taxes to be paid on account of the transfer of the property belonging to the estate, adjudged and decreed that the interest of

Grace D. Meldrum amounted to \$45,638.41 for taxation purposes, and that she pay an inheritance tax thereon of \$740.96, and that the legacy of Claribel M. Metzger for such purposes amounted to \$56,355.06, and that she pay an inheritance tax of \$1,040.65.

On April 30, 1921, the state of Minnesota, through the attorney general, made application to the probate court, asking that its judgment be amended so as to require Grace D. Meldrum to pay an inheritance tax upon the whole estate, and adjudging such tax to be \$2,429.74, upon the theory that the will gave to her the entire estate, subject only to the gift to the daughter of what might remain at the time of her death. The probate court adopted the contention made on behalf of the state.

The question presented is, did the relator receive under the will only a life estate with the remainder over to the daughter, or did she receive the absolute estate? To determine this question, it becomes necessary to construe the will. When that instrument is considered in its entirety and each clause construed in the light of the other provisions, but little difficulty will be encountered in arriving at what the testator intended.

Clearly his purpose was to provide for the comfort, support and welfare of his wife during her life, and at the same time to preserve his estate for the benefit of their daughter. To carry out the purpose, he willed his entire estate, together with the rents, issues and profits thereof, to his wife, the relator, for and during her natural life, with full power to encumber or sell and dispose of any or all of said property as might become necessary for her best interests, or as she might think best, without being compelled to account to the probate or any other court for the proceeds.¹

The power to sell is not limited to securing means for the wife's support, but it authorizes her to sell and dispose of so much thereof as she may think best. It was given clearly for her own personal benefit and that of the estate, and does not authorize her to give away any part of the property or to change the residuary legatee so as to defeat the purpose of testator as to the final disposition of his estate. It is clear that the testator did not intend that his wife should take the fee in the property, so as to exercise unlimited power of disposition such as an owner

¹See correction on page 346, *infra* [Reporter].

in fee might. If such had been his intention, it is but reasonable to suppose that he would have willed the same direct to her in fee. It must have been his wish that his wife control and manage the estate during her life as she might think best.

The legatees were apparently content with the decree of the probate court made in the first instance. It gave to relator a life interest coupled with a power to sell, and to the daughter the remainder, upon which they were required to pay an inheritance tax of \$1,781.61. Should the contention of the respondent prevail, the estate would be required to pay a second inheritance tax before the daughter might receive the farm.¹ It hardly seems that the exigency of the case requires such a construction to be placed upon the will for taxation purposes. The testator intended his entire estate to descend to his blood relative, under the provisions of his will, unless it might become necessary or best, in his wife's opinion, to sell the same, in which case the proceeds should, at the time of her death, go to the daughter.¹

The fact that relator was given the right to change the character of the property in no way enlarged her interest in the estate. As we read and construe the will she received a life estate in the property, plus the power to sell as she might think best, remainder to the daughter. The proceeds of the property remaining in her hands at the time of her death belong to the daughter, though by the terms of the will the wife was entitled to the same for her support. *Bevans v. Murray*, 251 Ill. 603, 96 N. E. 546. While it is true, as contended by the state, that relator took more than a life estate, no authority was given her to invade and deplete the corpus, unless necessary for her support. Testator's purpose was to preserve the estate for his family. The rule is well settled as to construction of wills. *Long v. Willsey*, 132 Minn. 316-320, 156 N. W. 349; *Brookhouse v. Pray*, 92 Minn. 448-451, 100 N. W. 235; *Yates v. Shern*, 84 Minn. 161, 86 N. W. 1004; *In re Swenson's Estate*, 55 Minn. 300, 56 N. W. 1115. While relator was not required to account to the court for the proceeds of any sale, yet the fee vested in the daughter at the death of testator and the proceeds of any sale became the property of the daughter, subject to the life interest of re-

¹See correction on page 346, *infra* [Reporter].

later therein, and at the relator's death the daughter would be entitled to the possession thereof.

The great weight of authority is that where an estate for life is expressly given, and a power of disposition is coupled with it, the fee does not pass to the life tenant under the devise, but only the naked power to dispose of the fee. *Borden v. Downey*, 35 N. J. Law, 74; *Rhode Island Hospital Trust Co. v. Commercial Nat. Bank*, 14 R. I. 625; *Spaan v. Anderson*, 115 Iowa, 121, 88 N. W. 200; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311; *McCullough's Admr. v. Anderson*, 90 Ky. 126, 13 S. W. 353, 7 L.R.A. 836; *Hinkle's Appeal*, 116 Pa. 490, 9 Atl. 938; *Pickering v. Langdon*, 22 Me. 413; *Redman v. Barger*, 118 Mo. 568, 24 S. W. 117; *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890; *Power v. Wells*, 244 Ill. 558, 91 N. E. 717; *Chewning v. Mason*, 158 N. C. 578, 74 S. E. 357, 39 L.R.A.(N.S.) 805; *Steff v. Seibert*, 128 Iowa, 746, 105 N. W. 328, 6 L.R.A. 1186.

Since the life estate to the wife and the remainder to the daughter are vested interests in the estate, an inheritance tax is assessable on the transfer, under the will, of such interests, pursuant to the provisions of section 2272, G. S. 1913, as amended by chapter 410, p. 479, Laws of 1919. We therefore arrive at the conclusion that the original decree of the probate court was correct and that the case should be remanded with directions to vacate the final decree entered therein on April 30, and to reinstate the original decree of April 20, 1921. It is so ordered.

On July 16, 1921, the following order was filed:

The state has moved for a reargument. We adhere to the original decision but some inaccuracies should be corrected.

It is the opinion of the court that, under the terms of the will, the widow took only a life estate with the power to change the form of the corpus, but without any right, for her own benefit, to exhaust any portion of the principal. Statements in the opinion suggesting a power in the widow to sell for her support should be considered as inadvertent-ly made. The same may be said as to the suggestion made that the contention of the state would result in the payment of a second inheritance tax before the daughter would receive the farm.

Motion for reargument denied.

JERRY ROGERS v. CENTRAL LAND & INVESTMENT COMPANY.¹

July 1, 1921.

No. 22,220.

Findings not supported by evidence.

1. The evidence fails to sustain the finding that defendant fraudulently misrepresented the value of the land, or the finding that plaintiff lacked mental capacity to make the contract in controversy.

Contract by incompetent — evidence required.

2. To establish that a person lacked mental capacity to make a contract, it must appear that he was unable to comprehend, to a reasonable extent, the nature and effect of the contract.

After the former appeal reported in 140 Minn. 295, 168 N. W. 16, the case was tried before Giddings, J., who when plaintiff rested denied defendant's motion to dismiss the action, and submitted to the jury the special questions mentioned in the third paragraph of the opinion, made findings and ordered judgment in favor of plaintiff as stated in the opinion. From an order denying its motion for a new trial, defendant appealed. Reversed.

R. B. Brower and *S. A. Johnson*, for appellant.

M. A. Hessian and *Roberts & Strong*, for respondent.

TAYLOR, C.

This is an action to rescind a contract for the purchase of a section of land in Luce county, Michigan. It has been tried twice. At the first trial, the court submitted special questions to a jury covering the two claims of fraud then urged, namely, that defendant's agent had falsely represented that the land was "cut over" land, and that it was of the value of \$25 per acre. The jury answered these questions in favor of the plaintiff. The court incorporated the conclusions of the jury in

¹Reported in 183 N. W. 961.

its findings of fact and directed judgment for plaintiff. On appeal, this court held that the findings were not sustained by the evidence and granted a new trial. *Rogers v. Central Land & Inv. Co.* 140 Minn. 295, 168 N. W. 16. A more complete statement of the facts will be found in that opinion.

Before the second trial plaintiff amended his complaint by inserting allegations to the effect that he had been addicted to the excessive use of intoxicating liquors for many years, and by reason thereof was not mentally competent to make the contract; that the contract was an improvident one, for the reason that he did not possess the financial resources necessary to enable him to make the deferred payments, and that defendant and its agents, for the purpose of defrauding him, took advantage of his weakened mental condition to induce him to make what they knew was an improvident contract. The amendment also contained an allegation to the effect that defendant's agents plied him with liquor and induced him to execute the contract while intoxicated, but the testimony showed that his charge was wholly unfounded and it was abandoned.

At the second trial, the court again submitted to a jury special questions covering the two claims relied upon at this trial, namely, the claim that defendant's agent had falsely represented the land to be of the value of \$25 per acre, and the claim that plaintiff was mentally incompetent to make the contract and that defendant's agent had taken undue advantage of his condition to induce him to make it. The jury answered these questions in favor of the plaintiff. The court incorporated the conclusions of the jury in its findings and directed judgment for plaintiff. Defendant moved for a new trial and appeals from the order denying it.

On the former appeal, it was held that the former decision could not be sustained on the ground of false representations as to value. Neither can the present decision be sustained on that ground. While the evidence is not the same as at the first trial, it fails to show any representations which would bring the case within the exceptions to the general rule that statements of value do not constitute actionable fraud. It appears from the cross-examination of plaintiff that this claim of fraud rests on the fact that he was told that the selling price of the

land was \$25 per acre and that he would have to pay that price for it. This statement furnished no basis for a claim of fraud. This was the selling price which defendant had placed on the land and the same price at which it made sales to others of similar land in the same vicinity. Plaintiff presented evidence tending to show that \$25 per acre was much more than the land was worth, but failed to show that defendant's agent had made any representations as to value, except to state the selling price fixed by defendant. An examination of the record fails to disclose any false statements or representations of any sort, and no other claim of misrepresentation is now urged.

Plaintiff's attorneys argue with force and earnestness that the evidence is sufficient to sustain the finding that plaintiff was not mentally competent to make such a contract, but concede that this finding is not in accord with plaintiff's own opinion as expressed in his testimony.

The contract in controversy bears date July 10, 1915. Plaintiff was then about 58 years of age and unmarried. He was illiterate; was only able to read a little and write his name. He had been raised on a farm and had lived in Wright county over 40 years and owned 80 acres of land in that county which had been conveyed to him by his father. He had been a heavy drinker for many years, but had taken a liquor cure in May and June preceding the making of the contract and was not drinking to a harmful extent at that time. During all his lifetime, after reaching the age of maturity, he had conducted his own business affairs without any suggestion that he was not fully competent to do so. After his father's death he had settled his father's estate and his father's debts. There had been litigation between him and his brothers concerning his father's estate, and his brothers had also prosecuted an action against him to set aside the deed from his father to the 80 acres of land. He had conducted his side of this litigation and it had resulted in his favor. He had bought 40 acres of land, borrowing the money to make the initial payment, and had farmed it for some years and had then sold it, apparently at a profit. The evidence is to the effect that in his business dealings he exhibited considerable shrewdness, but that, aside from the matters above mentioned, his prior business dealings had not involved transactions of any considerable moment.

He had been informed that his brothers contemplated bringing an-

other action for the purpose of getting his land away from him. In discussing this matter with a friend, the advisability of selling the land to avoid further trouble was suggested, and he concluded to dispose of it. Shortly before this, plaintiff had become acquainted with J. J. Hicks and John M. Charlton, who stopped for a few days at the hotel in Waverly where plaintiff seems to have been staying. Hicks was defendant's agent for the sale of its lands, and had made an arrangement with Charlton, by which Charlton was to receive a part of the commission on any sales made to purchasers produced by Charlton. Plaintiff knew that Hicks and Charlton were selling Michigan lands, but states that they said nothing to him concerning these lands. After Hicks had left Waverly, plaintiff had a conversation with Charlton, in which he told Charlton of the threatened lawsuit and discussed the matter of exchanging the 80 for Michigan land. Charlton could not make such a deal, and told plaintiff it would be necessary to see Hicks and promised to do so. They knew that Hicks had arranged to take a party of land-seekers from St. Paul to the land, and, as a result of his talk with Charlton, plaintiff joined this party at St. Paul and went to Michigan to examine the land. Plaintiff had no talk with Hicks in reference to making a purchase until they had examined some of the land owned by the company. The following is an excerpt from his testimony on cross-examination concerning this talk with Hicks:

"Q. I believe you stated that Hicks then made the remark that if he thought you were going up there to work the place or to live on the place he would not make any deal with you at all? A. Yes, sir; he made that remark. Q. That it was no place for you? A. Yes, sir. Q. And as a matter of fact you told Hicks before that that it was your intention in making the exchange for this land, if you made the deal, to sell as much as you could of the land that you got in exchange, didn't you? A. Well, something like that. That he would sell it or help me to sell it. Q. You told Hicks at that time that you could sell that land, didn't you? A. At that time I did, and I thought I could, yes. Q. And you told him at that time you had friends around in your home country you thought would be interested in this land and that you felt sure that you could sell it and get some of them to buy some of this land? A. Well, yes. Q. And you thought you could, didn't you? A.

Yes, sir. Q. And that is what you told Hicks? A. Well, something like that."

On their return to Waverly the contract was executed. Plaintiff took the section at \$25 per acre amounting to \$16,000; defendant took the 80 at \$100 per acre amounting to \$8,000, the price placed on it by plaintiff. The 80 was encumbered by mortgages which defendant assumed and subsequently paid. Plaintiff's interest in the 80 in the sum of \$5,500 was applied as the first payment on the purchase price of the section. The remainder of the purchase price was divided into 15 annual payments of \$700 each with interest payable annually. To give plaintiff an opportunity to make sales before the deferred payments became due, the first of these deferred instalments was made payable five years from the date of the contract. A subsequent instalment became due each year thereafter. Plaintiff tried to find purchasers for the land, but did not succeed in making any sales and abandoned the attempt.

The two witnesses, whose testimony is relied upon to sustain the finding that plaintiff was not mentally competent to make the contract, made no attempt to point out any instance, during the 30 years or more that they had known him, in which he had failed to exercise ordinary business sagacity in looking out for and protecting his own interests. They merely answered the question, whether, in their opinion, plaintiff had "mental capacity sufficient to look after and to take care of his interest in a transaction of the kind" here involved, in the negative. One of them expressed his idea of plaintiff's capacity in these words: "Well, I would say that in a general way he was a man of average capacity, but in a business way I would say that he was below the average man." The idea of the other, so far as expressed, is shown by the following excerpt from his testimony. "Q. He had the ordinary average ability, did he not? A. Well, no, I wouldn't say that. I don't think he has. Q. Well, would you say that he was below the ordinary individual in that respect? A. I would not like to answer that question. Q. Then your opinion is that he was of ordinary average ability, is that your opinion? A. Well, not that either." Neither of these witnesses were experts and their opinions were based largely, if not wholly, on the fact that plaintiff had been a hard drinker. They

nowhere state that he had any mental affliction or infirmity, or lacked sufficient ability to transact ordinary business. They were doubtless unconsciously influenced in their opinion by the fact that the present venture turned out unprofitably.

The rule to be applied in determining whether a contract may be avoided for lack of mental capacity to make it, as deduced from the prior decisions of this court, is stated in 1 Dunnell, Minn. Dig. § 1731, thus: "Mere mental weakness does not incapacitate a person from contracting. It is sufficient if he has enough mental capacity to understand, to a reasonable extent, the nature and effect of what he is doing." This is the rule applied generally. 16 Am. & Eng. Enc. (2d ed.) 624; 22 Cyc. 1206; 14 R. C. L. 590.

The evidence is clearly insufficient to sustain a finding of incompetency within this rule, or to charge defendant's agent with any wrongdoing. Really the only basis for the claim of incompetency is the fact that plaintiff made an improvident contract for a man in his situation. But, as said by another court, the making of an improvident contract is not sufficient in itself to show lack of capacity to make contracts. If this were so, the number of incompetents would be legion.

Order reversed.

BROWN, C. J. (dissenting).

In my view of the record the questions whether plaintiff had sufficient mental capacity to understand and comprehend the transaction complained of, and whether inequitable advantage was not derived therefrom by defendant, were issues of fact and properly submitted to the jury. The verdict given in answer to both questions, favorable to plaintiff, is not as I read the record manifestly against the evidence, within the rule guiding this court in such cases, and should not be disturbed.

HALLAM, J. (dissenting).

I agree with the Chief Justice.

A. L. OLSON v. GREAT EASTERN CASUALTY COMPANY.¹

July 1, 1921.

No. 23,309.

Burglary insurance — books and accounts of insured — charge to jury.

1. Under the terms of a burglary insurance policy, there was no liability "unless books and accounts are kept by the assured in such manner that the exact amount of loss may be accurately determined therefrom by the company." The court correctly instructed that, if the books and accounts kept were such that, with the assistance of those who kept them, or understood the system, the amount of the loss could be ascertained, the condition was not violated.

Construction of policy in respect to goods insured.

2. The goods specifically named in the coverage clause of such a policy, cannot be excluded by some general prior exception therein.

Not a question for the jury.

3. There was not sufficient proof to go to the jury of the defense that plaintiff had prevented the insurer from settling with the owners of the goods lost, nor was the question properly raised at the trial.

Charge to jury.

4. Defendant cannot be heard to complain of the charge relating to lost fur-lined garments, since it accorded with the language of the policy construed most favorably to it.

Action in the district court for Hennepin county to recover \$815 on a policy of burglary insurance. The case was tried before Molyneaux, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$784. From an order denying its motion for a new trial, defendant appealed. Affirmed.

F. D. Larrabee, for appellant.

M. H. Boutelle, A. H. David and Le Roy Bowen, for respondent.

¹Reported in 183 N. W. 826.

HOLT, J.

Plaintiff's tailor shop was broken into and goods and garments carried off. Defendant had insured against loss from burglary. This action, brought on the policy, resulted in a verdict for plaintiff. Defendant appeals from the order denying its motion for a new trial.

The defensive matters alleged were: (1) That plaintiff did not keep books of account as required by the policy; (2) that goods held in trust and lost by the burglary were not covered; (3) that, if such goods were covered, plaintiff violated the provisions of the policy by settling with the owners for the loss, without giving defendant the opportunity to so do, and (4) that the lost goods made of furs were not covered.

The policy contained a provision that defendant should not be liable for loss of "anything, unless books and accounts are kept by the assured in such manner that the exact amount of loss may be accurately determined therefrom by the company." Plaintiff's shop was small. He employed but two or three workmen. There was evidence that he kept such books and accounts as persons doing a similar business usually keep. One way of keeping an account of garments received for repairs was to make out a tag containing the name of the owner and a notation of what was to be done thereto, and attach it to the garment, and to give the owner another tag evidencing his right to receive it back. When the burglars took the garments, they took the tags with them. But, although some items of plaintiff's accounts were thus missing, we think from the balance, and the tags procured from the owners, defendant could have accurately determined the loss, had it chosen to attempt the task. The court charged the jury on this issue in conformity to the law as, we think, well stated in *Liverpool & L. & G. Ins. Co. v. Ellington*, 94 Ga. 785, 21 S. E. 1006, in these words [p. 791]:

"Under the clause referred to, it was not indispensable that the books kept should embrace what is usually termed a cash book, or that the books should be kept on any particular system. It was sufficient if the books were kept in such manner that, with the assistance of those who kept them or understood the system on which they were kept, the amount of purchases and sales could be ascertained, and cash transactions distinguished from those on credit, although it might be slow and difficult to do this."

Western Assur. Co. v. Redding, 68 Fed. 708, 15 C. C. A. 619; Western Assur. Co. v. McGlathery, 115 Ala. 213, 22 South. 104, 67 Am. St. 26; Beaird v. New Jersey P. G. Co. 157 Ill. App. 1, are to the same effect.

The policy by its terms covered the general stock of "tailoring goods and trimmings and clothing held * * * in trust for cleaning and repairs; excluding silks, furs," etc. We cannot approve of the contention made by defendant that, since the policy contains a clause that defendant shall not be liable for loss of "merchandise unless it belongs to the assured or is held by him in trust or on commission, or is sold but not removed from the premises, or unless the assured is legally liable to the owner thereof for such loss or damage as is covered hereby," therefore the garments taken in for repairs are not covered. Such garments are expressly named as insured, and cannot be excluded by a prior general exception found in the policy. The court was right in charging the jury that garments left for repairs and lost by the burglary were covered.

The evidence does not show that plaintiff took the matter of settlement with the owners of the garments left for repairs into his own hands, so as to prevent defendant from taking advantage of a provision in the policy that it could negotiate such settlements. The issue was not submitted to the jury, nor was there a request for its submission. The question was first raised on the motion for a new trial, and it is of no merit. Defendant seems to have consistently refused to recognize any liability for any of the goods of others left with plaintiff for repairs.

Three of the garments lost were fur-lined overcoats. Defendant requested the court to charge that no recovery could be had for their loss, and also that, if a recovery could be had, it must be limited to the value of the coats, without the fur lining. The court refused, but instructed that if the overcoats were principally of fur there could be no recovery. We think this as favorable to defendant as to the policy warrants. The goods excluded from coverage were "silks, furs, feathers, linen laces, silk laces, hand embroideries, silk velvets and velours or articles made in whole or principally thereof." The terms of an insurance policy are to be construed more strictly against the insurer than the insured. The language used is that of the insurer. So construed there is force in the suggestion that the words "or articles made in whole or principally

thereof," should be held to refer only to "silk velvets and velours." However that may be, the instruction given was within the language of the policy as formulated by appellant.

The record presents no ground for disturbing the verdict.

Order affirmed.

EUGENE ENGEL v. MINNEAPOLIS STREET RAILWAY
COMPANY AND ANOTHER.

MINNEAPOLIS & ST. PAUL SUBURBAN RAILROAD
COMPANY, APPELLANT.¹

July 1, 1921.

No. 22,310.

Railway — negligence in guarding crossing not a question for the jury.

1. Under the proofs it was error to submit to the jury the question of negligence of appellant in failing to provide a flagman, gates or a bell at the crossing.

Contributory negligence of truck driver.

2. Evidence considered and held to show contributory negligence on the part of respondent, as a matter of law.

Action in the district court for Hennepin county to recover \$20,000 for injuries received when an automobile truck driven by plaintiff came into collision with defendant's street car. The case was tried before Leary, J., who when plaintiff rested and at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$750. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

Ralph T. Boardman and *W. D. Dwyer*, for appellant.

Marf. M. Monaghan and *Tautges & Bissell*, for respondent.

¹Reported in 183 N. W. 842.

QUINN, J.

Appeal by the Minneapolis and St. Paul Suburban Railroad Company from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

On August 9, 1919, between 6 and 7 o'clock in the afternoon, plaintiff was driving his automobile truck southerly along a public highway which crosses defendant's railroad track near the westerly limits of the city of Minneapolis. The record does not disclose how much traffic there was upon this highway. Plaintiff was familiar with the crossing and knew of the cars running over the tracks at this point. There was no load on his truck. Jacob Bove, plaintiff's hired man, was riding on the truck at the time of the accident. The blocks in this vicinity are 300 feet square. A car going west comes first to Xerxes, then to York and then to Zenith avenue, where the accident occurred. York avenue was not open to travel across the track. The defendant's right of way is fenced and there are regular cattle guards on either side of the crossing. The car with which the collision occurred was moving in a westerly direction.

The plaintiff testified that as he approached the tracks his truck was moving at the rate of about two miles an hour, and that he could have stopped it almost instantly, within three or four feet; that, as he was going up the little slope and when within 10 or 15 feet of the track, he looked to the left and saw a street car about a block and a half or two blocks away; that he then looked forward and to the right, and by that time was on the track with the front wheels; that he turned and looked back to the east and saw that the street car was within about 150 or 200 feet from the crossing where his truck was; that for a year the cars had always slowed down some as they came to that crossing, and that he had seen them stop there; that when he first saw this street car it was between Xerxes and York avenues; that the last time he saw it it seemed to him as if it were coming 50, 55 or 60 miles an hour, and that his truck was just going over the track when the street car came in contact with it; that there was no flagman, crossing gate or bell at this crossing; that he heard no gong or bells at all, and that he knew the car was coming after he saw it.

The witness Bove testified that he was riding in the seat with plaintiff

on his truck; that he first saw the car that struck the truck when they were about 120 feet north of the track, and that the car was then near Xerxes avenue.

Defendant's negligence was made a question for the jury by the proofs. Two other questions are presented by the record. Does the testimony show negligence on the part of respondent as a matter of law? Was it error, in the absence of any proof as to the amount of traffic upon the highway, to submit to the jury the question of negligence of appellant in failing to provide a flagman, crossing gates or a bell at this crossing? Respondent was perfectly familiar with the crossing. He had passed over it a great many times and knew of the running of cars thereon. He approached the crossing from the north, and when within about 120 feet of the track his hired man, sitting in the seat by his side, saw the car that struck them coming from the east over a block away. After respondent reached the right of way the car was in plain sight and he saw it. There was gradual ascent of three or four feet from the north for a distance of from 35 to 100 feet. The surface of the highway was soft and heavy. Respondent did not stop his truck when he saw the car, but shifted the gears to low so that the truck was not moving faster than two miles per hour. When the front wheels had passed the first rail of the track the street car struck it, causing the injuries and damage complained of. The street car stopped with its front trucks over the cattle guard and the rear trucks in the highway.

The decisive question as to respondent's right to recover is whether the evidence conclusively establishes contributory negligence on his part. When respondent reached the right of way, according to his own testimony, and while there was ample time for him to stop his truck, he looked and saw the approaching car at his left. He did not attempt to stop, but shifted his gear and slowed down his truck. It was struck while the front wheels were passing over the rails. He must have thought that he could cross the track before the car reached the point. Under such circumstances it must be held that he was negligent as a matter of law. *Anderson v. Great Northern Ry. Co.* 147 Minn. 118, 179 N. W. 687.

We think it was error to submit to the jury the question whether ap-

pellant was guilty of negligence in failing to provide a flagman, gates or bell at the crossing, under the proofs shown by the record. Zenith avenue is near the western limits of the city. There was no proof as to the amount of travel thereon, nor will the court take judicial notice of the amount of travel from the mere name of the avenue, any more than it could from the name York, the next avenue, which, it appears, was never open to travel.

By his own lack of care plaintiff directly contributed to the happening of the accident complained of, and it must be held that he was guilty of contributory negligence as a matter of law.

The order appealed from is reversed and the case remanded with directions to enter judgment on the merits for the appellant.

DIBELL, J. (dissenting).

I agree that it was error to submit the absence of gates or a flagman at the crossing as a ground of negligence. I do not agree that contributory negligence of the plaintiff is conclusively shown and that there should be judgment notwithstanding the verdict.

HOLT, J. (dissenting).

I concur in Justice Dibell's dissent.

GEORGE C. LAUER STONE & CONSTRUCTION COMPANY v.
ARMOUR & COMPANY.¹

July 1, 1921.

- No. 22,312.

Increased rent demanded before termination of lease.

1. It is *held*, on the facts stated in the opinion, that the term of the lease under which defendant was occupying the premises in question had not been terminated by the act of the parties, or otherwise, at the time plaintiff made demand for increased rent as a condition to continued possession by defendant, and that the demand to that effect was without basis for its support and of no force or effect.

¹Reported in 183 N. W. 819.

Directed verdict for defendant proper.

2. The evidence *held* insufficient to present an issue of fact for the jury, and that a verdict was properly directed for defendant.

Action in the district court for Ramsey county to recover \$17,100. The facts will be found in the opinion. The case was tried before Dickson, J., who before the introduction of testimony denied defendant's motion to dismiss the action because the complaint was on an implied agreement to pay \$100 a day when the action was clearly one on an express agreement, and at the close of the testimony, directed a verdict in favor of defendant. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

Henry C. James, for appellant.

Davis, Severance & Morgan, for respondent.

BROWN, C. J.

In the construction of buildings forming its packing plant in South St. Paul, defendant required, as necessary building material, large quantities of crushed rock for use in the concrete part of the work. Plaintiff was the owner of a stone quarry a few miles north of South St. Paul where the material could be had. Negotiations between the parties resulted on August 13, 1918, in a lease of the quarry with equipment to defendant for such time as might be necessary from the operation thereof to produce the material in the quantity required. In consideration of the grant defendant agreed to pay plaintiff: (1) Twelve and one-half cents per cubic yard for all stone removed; and (2) to loan plaintiff \$10,000 to enable it to pay off and discharge certain liens and encumbrances which were a menace to plaintiff's title and future ownership of the quarry. Defendant thereafter entered into the possession of the property and continued the operation thereof until some date in June, 1919, when the work was temporarily suspended, being again resumed in the month of September following. Defendant fully complied with the terms of the contract by paying the stipulated compensation for the stone removed, and loaning to plaintiff the agreed sum of \$10,000; there was no breach of the contract in either respect. During the period when work in the quarry was suspended, and on July 18, 1919, plaintiff pre-

pared and caused to be served upon defendant a notice, by which there was an attempt to terminate the leasehold rights of defendant, and, on the theory that they had in fact been terminated, notifying defendant that, if possession of the premises was not surrendered by July 23, defendant would be required to pay for the continued possession thereof the sum of \$100 per day "for each day after said July 23, 1919, until you surrender" the same, in addition to the stipulated rate per cubic yard for the material thereafter removed. Defendant refused to recognize the notice, claiming that the term of the lease had not expired, and as heretofore stated resumed operations at the quarry in September, continuing the same until late in December, when work was again suspended, though the required quantity of material had not yet been obtained.

Thereafter, on January 10, 1920, plaintiff brought this action to recover the increased rent demanded by the notice just referred to, for the period from July 23 to the commencement of the action, alleging in the complaint that the term of the lease had expired prior to the date of the notice and that defendant's subsequent retention of the quarry was as a holdover tenant, and at the increased rent demanded. Defendant by answer joined issue upon the question whether the lease had terminated as claimed by plaintiff; also upon the further question whether the failure of defendant to surrender the premises in response to the notice exposed it to the greater liability demanded. At the close of the trial a verdict was directed for defendant on the ground that its leasehold rights had not expired by abandonment, consent of parties or otherwise, therefore that the notice to quit or pay more rent was unauthorized, hence ineffectual for any purpose. Plaintiff appealed from an order denying a new trial.

The action is founded on the theory that the term of the lease had expired at the time the notice to quit was served, and that, by thereafter retaining possession of the property and failing to return it to plaintiff, defendant by implication of law is deemed to have accepted the conditions imposed and therefore liable for the increased rent. If the theory that the leasehold term had ended at the date of the notice be sustained by the evidence, defendant's liability for the greater rent is clear. *Gardner v. Board of Co. Commrs. of Dakota County*, 21 Minn. 33; *Moore*

v. Harter, 67 Oh. St. 250, 65 N. E. 883; Williams v. Foss-Armstrong Hdwe. Co. 135 Wis. 280, 115 N. W. 803. But if the lease had not expired there was no basis for the notice to quit and it must fall as without force or effect.

We find from the record no evidence to justify the conclusion that the term of the lease had expired, either by lapse of time, by abandonment or by the failure of defendant promptly to prosecute the work in getting out and removing the material, nor evidence which would justify a submission of the question to a jury.

The lease provides in clear language that the term thereof should continue for such period as might be necessary to enable defendant, by the exercise of reasonable diligence, having due regard to economy in handling and using the same, to quarry, crush and ship the required quantity of material to the scene of the building operations. The undertaking in which defendant was engaged was an extensive one and large quantities of this class of material were necessary, to be used from time to time as the construction work progressed. Necessarily the parties contemplated that the time necessary for the purpose would be indefinite and extend over a considerable period. There was no unnecessary delay by defendant. The quarry was promptly taken over and no claim is made of unreasonable or other delay during the time the operations were under way. The suspension from June to September is not shown to have been unwarranted or unnecessary, and no conclusion of abandonment can be predicated thereon. Defendant was not required by the lease to continuously operate the quarry, and, under the liberal terms and provisions thereof, neither court nor jury could find that a failure to do so was a breach of the contract. Defendant had not at the date of the notice taken out enough material for its use, and the claim that some representative of the company had stated to plaintiff without qualification that defendant was through with the quarry is not sustained by the facts disclosed. There were some negotiations or attempted negotiations between the parties during the time work at the quarry was shut down looking to a possible relinquishment of rights under the lease. But nothing came of them and defendant resumed operations in September. In this state of the facts, of which the record leaves no room for fair doubt, defendant's rights under the lease had

not ended and the demand for higher rent was without right and must fall as of no force or effect. The Gardner case, *supra*, is not in point. In that case the term of the lease had expired, of which there was no dispute, and the tenant was holding over in the face of a demand for increased rent. Such is not the case at bar.

Order affirmed.

THENA RUSTAD v. L. A. LAMPERT.¹

July 1, 1921.

No. 22,314.

Surrender of leased premises — cracked furnace — failure of proof.

A lease obligated the lessee to deliver up the premises at the end of the term in as good order and condition and state of repair as they were at the time of the letting, reasonable use and wear and inevitable accident excepted. When the premises were surrendered the furnace was cracked. Proof of these facts made it incumbent on the tenant to prove that the damage was due to the excepted cause. Under the evidence in the case a finding for plaintiff is sustained.

Action in the district court for Pennington county to recover \$60 for two months' rent and \$380 for the damaged condition of the premises when surrendered. The case was tried before Grindeland, J., who made findings and ordered judgment in favor of plaintiff for \$318.20. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

E. M. Stanton, for appellant.

O. A. Naplin, for respondent.

HALLAM, J.

Plaintiff owned a house in Thief River Falls in which was a steam heating plant. In March, 1918, plaintiff leased it to defendant by written lease for a year from May 1, 1918. Defendant took possession. The lease was renewed for another year. The lease contained a clause

¹Reported in 183 N. W. 843.

which required the lessee to quit and deliver up the premises at the end of the term "in as good order and condition and state of repair, reasonable use and wearing thereof and inevitable accident excepted, as the same now are." In December, 1919, the boiler in the heating plant cracked or burst and was damaged to the extent of \$300 and the premises were surrendered in this damaged condition. Plaintiff sued to recover this amount. Plaintiff prevailed and defendant appeals.

Under the terms of the lease plaintiff is entitled to recover, unless the cracking of the boiler was due to inevitable accident. The court found in effect that it was not due to inevitable accident, but that it was caused through the negligent and careless handling of defendant.

The evidence is that the bursting of the furnace was probably caused either by freezing, or from being dry, and then, when heated, coming into contact with water. There is nothing in the evidence to indicate freezing. There is evidence that a steam plant, if not in good working order, or if rust and dirt accumulate, may become air bound, that is, the water gets up in the radiators and remains there for awhile, and when it does come down it may crack the boiler. There is evidence that this heating plant was in running order at the time defendant took possession. After the damage was done, defendant endeavored to repair it, and, finding that he could not do so, made other provision for heating the house, all without suggestion that it was incumbent on anyone other than himself to restore it.

We think the evidence such as to sustain the finding of the court that the damage to the furnace was not the result of inevitable accident. Plaintiff made out a prima facie case when she proved that the premises were surrendered in damaged condition. It was then incumbent on defendant, if he would avoid liability, to prove that the damage was due to the excepted cause. Underhill, *Landlord & Tenant*, § 537; *Peck v. Scoville Mfg. Co.* 43 Ill. App. 360. The court might properly find that he had failed to do so.

Judgment affirmed.

**WILLIAM P. HARRISON, AS RECEIVER OF UNITED STATES
& DOMINION LIFE INSURANCE COMPANY v. E. C. CARMAN.¹**

July 1, 1921.

No. 22,317.

Constitutional liability of stockholder — possible defenses.

1. The assessment levied by the court against a stockholder in a corporation does not preclude the defense that he was not a stockholder at all, or was not the holder of so large an amount of stock as was alleged in the complaint in an action brought to enforce his constitutional liability.

Directed verdict not warranted.

2. The evidence did not justify the court in directing a verdict against defendant for the full amount of his assessments.

Action in the district court for Hennepin county to enforce defendant's constitutional liability as stockholder in the insolvent corporation. The case was tried before Fish, J., who when plaintiff rested denied defendant's motion for dismissal and his motion for a directed verdict and granted plaintiff's motion for a directed verdict. Defendant's motion for judgment notwithstanding the verdict or for a new trial, was denied. From the judgment entered pursuant to the verdict, defendant appealed. Reversed.

Ernest C. Carman and Gordon Cain, for appellant.

A. E. McManus, for respondent.

LEES, C.

Appeal from a judgment for plaintiff in an action to enforce defendant's constitutional liability as a stockholder in a corporation. The complaint alleged that defendant had subscribed for and was the owner of 10 shares of stock; that in proceedings in the district court of St. Louis county, a first assessment of 50 per cent was levied against each

¹Reported in 183 N. W. 826.

share of stock the corporation had issued, and later a second assessment of like amount, and that defendant failed to pay either assessment. The answer was a general denial. The trial was by jury. Being called for cross-examination, defendant testified that, as an attorney at law, he drew articles of incorporation and attended the first meeting of the corporation; that a certificate for 5 shares of stock was issued and delivered to him; that it was the only certificate he ever had and that he never owned any stock in the corporation except these 5 shares. To prove that defendant was a stockholder, plaintiff read in evidence the stubs in the certificate book for certificate No. 95 for 5 shares and certificate No. 256 for 5 shares, both certificates purporting to have been issued to defendant. Portions of an order of the district court of St. Louis county, directing the receiver to proceed to collect unpaid subscriptions for stock were also read in evidence. The order recited that certain persons were stockholders and owned the number of shares set after their names. Defendant's name appeared as the owner of two certificates, each for 5 shares. No other evidence relating to defendant's ownership of stock was introduced. When plaintiff rested, defendant also rested and moved separately for a dismissal and for a directed verdict in his favor. Both motions were denied. Then plaintiff moved for a directed verdict for the amount claimed in the complaint and his motion was granted. Defendant made the usual alternative motions for judgment or a new trial and both were denied and judgment was entered on the verdict.

The pleadings raised an issue as to defendant's ownership of stock. He was not precluded by the assessments levied against the stockholders from defending an action to collect them on the ground that he was not a stockholder at all or that he was not the holder of so large an amount of stock as the complaint alleged. *Straw & E. Mnfg. Co. v. Kilbourne B. & S. Co.* 80 Minn. 125, 83 N. W. 36; *Finch, Van Slyck & M. v. Vanasek*, 132 Minn. 9, 155 N. W. 754; *Greenfield v. Hill City L. L. & L. Co.* 141 Minn. 393, 170 N. W. 343. Defendant's positive testimony that he never received certificate No. 256 and never took or owned any stock except the 5 shares represented by certificate No. 59 made an issue which should have been submitted to the jury. Possibly a verdict against him for the full amount of his assessments might have been sustained if one had been returned, but the court was not justified

in directing the jury to return such a verdict. It follows that the judgment must be reversed and the case remanded for a new trial.

Judgment reversed.

THE METROPOLITAN NATIONAL BANK OF MINNEAPOLIS
v. HENNEPIN COUNTY SAVINGS BANK.¹

July 1, 1921.

No. 22,350.

Interpleader available in municipal court.

1. The remedy of interpleader given by section 7764, G. S. 1913, is available to a defendant sued in the municipal court of Minneapolis.

Statutory requirements for order of substitution.

2. The only showing the statute requires for granting an order of substitution, is that another than the plaintiff makes a claim upon defendant for the money or debt sued for, and that there is no collusion between such claimant and the defendant.

Interpleader — claim of party to be substituted.

3. It is not incumbent on defendant to show that the claim of the party asked to be substituted is valid.

Vacating judgment proper.

4. There was no abuse of judicial discretion in opening the judgment, entered as on default during the pendency of the hearing of the order to show cause why claimant should not be substituted.

Irregularities not prejudicial.

5. Minor irregularities in the order are either inadvertent omissions, readily rectified on application to the court below, or else relate to matters that cannot prejudice appellant.

Action in the municipal court of Minneapolis to recover \$300 upon a check certified by defendant. From an order C. L. Smith, J., granting defendant's petition to pay the money into court and directing the payee of the check to interplead and vacating the judgment entered by default, plaintiff appealed. Affirmed.

¹Reported in 183 N. W. 821.

Jay W. Crane, for appellant.

Roberts & Strong, for respondent.

HOLT, J.

Plaintiff sued defendant in the municipal court of the city of Minneapolis upon a check drawn on defendant and certified by it. Before the time for answering expired defendant obtained and served on plaintiff's attorney an order to show cause why defendant should not be allowed to pay the money into court and be dismissed, and Mrs. Robert McDonald, the payee of the check, who asserted ownership thereto, be substituted in the stead of defendant. The order did not stay proceedings, and plaintiff entered judgment, as on default, prior to the hearing, which was finally had upon an amended petition. Upon the hearing the court vacated the judgment, permitted defendant to pay the money into court, and directed Mrs. McDonald to interplead. Plaintiff appeals.

The chief contention is that section 7764, G. S. 1913, which permits a defendant, when sued for the recovery of money upon contract, to move the court to substitute in his place as defendant one who lays claim to the same money or debt and for leave to pay the money into court, is not applicable to suits brought in a municipal court. The contention is based on the theory that interpleader under that statute remains an equitable proceeding of which district courts alone have jurisdiction.

The jurisdiction of the municipal court of Minneapolis is conferred by section 2, c. 34, p. 599, Sp. Laws 1889, as now amended by chapter 407, p. 616, Laws 1917. The provisions therein, bearing on the question presented, read: "It shall not have jurisdiction of actions for divorce, nor of any action where the relief asked for in the complaint is purely equitable in its nature. Where no provision is otherwise made in this act, said municipal court is vested with all the powers which are possessed by the district courts of the state, and all laws of a general nature apply to said municipal court, so far as the same can be made applicable, and not inconsistent with the provisions of this act, and the jurisdiction of said court shall be co-extensive with the limits of said Hennepin county." This action is certainly one of which the court had jurisdiction. It is an action for money upon a contract. Defendant admits its obligation to pay the money demanded, but asserts that another party claims to be the

owner of the contract and entitled to the money. The controversy under the interpleader will, therefore, turn upon the fact whether or not the title to the check ever passed from the payee, the claimant. Ordinarily, the determination of such a fact does not require a court of equity to function, nor any affirmative equitable relief in favor of either party. We think section 7764 was intended to apply to municipal courts, even though interpleader is of equitable origin and the courts continue the procedure thereunder somewhat in accord with equity practice. That the remedy of interpleader and kindred statutory relief extended by the legislature was not intended to be confined to the district courts, is manifest in the very next section (7765), wherein a party is given the right, before suit, to place property or money claimed by different persons in the custody of the court, and for that purpose application may be made as well to a municipal court as to a district court.

Great stress is laid upon the alleged insufficiency of the petition on which the court acted. There is nothing to the point. Defendant was not required to make more of a showing than the statute prescribes. It was not necessary to show the validity of claimant's title to the money. The only condition imposed by the statute is that defendant make it appear to the court that another party demands the same money or debt which the plaintiff sues for, and that such demand or claim is made without collusion with defendant. We think this was done. The court could well conclude upon the showing made in the petition and amended petition that a reputable bank would not be a party to a collusion with Mrs. McDonald, the claimant.

The rights as between successive holders of a certified check are, in our opinion, not involved in this appeal. The statute (7764) was designed to let that and every issue as to who is entitled to the money sued for, be determined in the action after the claimant is substituted and the issues are framed between the then parties.

That the court exercised proper judicial discretion in opening the judgment is clear. *Schuler v. Wood*, 81 Minn. 372, 84 N. W. 21.

The failure of the order to require interest, a trifling amount, appears to be a mere inadvertence, which, no doubt, can be rectified upon application to the court below.

The order is criticised in other respects, but it is not apprehended that

plaintiff will be prejudiced on account of its provisions or omissions, for, if the claimant does not come in under the order as made, plaintiff will receive the money deposited.

Order affirmed.

JOSEPH SCHMITT v. ORNES ESSWEIN & COMPANY.¹

July 1, 1921.

No. 22,364.

Sale — fraudulent representation.

1. In an action for damages for deceit in the sale of an ice machine, the complaint alleged that the seller represented that the machine when installed could and would keep the buyer's ice-box at a temperature low enough to prevent meat from spoiling. Such a representation is held to be more than an expression of opinion or a prediction.

Fraud not waived.

2. The machine was installed and an initial payment made on May 1. On May 25 a second payment was made. Even if it should be presumed that the buyer had then discovered that the machine had been misrepresented, he might complete performance of his contract without waiving the fraud and then sue for damages for deceit.

Action in the district court for Hennepin county to recover \$2,176.03 for misrepresentations in the sale of an ice machine and to cancel promissory notes given defendant therefor. The case was tried before Molyneaux, J., who directed a verdict in favor of defendant for \$347.35. From an order granting plaintiff's motion for a new trial exclusively upon errors occurring at the trial, defendant appealed. Affirmed.

M. H. Boutelle, A. H. David and Le Roy Bowen, for appellant.

George T. Simpson, John F. Dahl and Eugene S. Bibb, for respondent.

LEES, C.

This is an action for damages for defendant's misrepresentations which induced plaintiff to enter into a written contract for the purchase of a

¹Reported in 183 N. W. 840.

second hand ice machine. There was a cash payment of \$250 and notes for the remainder of the purchase price, one of them being paid May 25, 1919. Plaintiff conducted a meat market, keeping his meats in an ice-box in which defendant set up the machine on or about May 1, 1919. It was designed to take the place of ice in maintaining the proper temperature for the preservation of meat. The complaint alleged that defendant had represented that the machine was as good as new and could and would afford a sufficient degree of refrigeration to keep meat from spoiling; that the representation was untrue, known by defendant to be untrue, and was made with intent to defraud plaintiff and to induce him to enter into the contract. Defendant objected to the reception of evidence offered by plaintiff, on the ground that the complaint failed to state a cause of action. The objection was sustained. In its answer defendant had pleaded two counterclaims based on the notes which had fallen due. A verdict was directed in its favor for the amount of the notes. Plaintiff moved for and was granted a new trial for errors of law and defendant has appealed. Two questions are presented by the appeal: (1) Do the facts alleged in the complaint state a cause of action? (2) What was the effect of the payment of the note?

1. Citing *Bigelow v. Barnes*, 121 Minn. 148, 140 N. W. 1032, 45 L.R.A. (N.S.) 203, defendant contends that, as pleaded, its representation amounted merely to a prediction that the machine would produce certain results in the future; that it was only an expression of opinion and not an assertion of a past or existing fact, and hence will not support a charge of fraud. We think the contention cannot be sustained. The essence of the representation was an affirmation that the machine was capable of reducing the temperature to a point low enough to keep meat from spoiling. It was more than a prediction or expression of opinion. It was a statement respecting the inherent capacity or power of the machine. Such a statement is one of existing fact, and, if made with knowledge of its falsity and with intent to deceive the person to whom it is made, amounts to an actionable fraud, if such person relied upon and was actually deceived by it.

The representation defendant is alleged to have made is not materially different from those involved in *Helvetia Copper Co. v. Hart-Parr Co.* 137 Minn. 321, 163 N. W. 665; *General Elec. Co. v. O'Connell*, 118

Minn. 53, 136 N. W. 404; and *Kerrick v. G. W. Van Dusen & Co.* 32 Minn. 317, 20 N. W. 228. In the first case the representation was that a tractor engine, when equipped with certain new parts, would be in good condition and capable of developing the horse power at which it was rated. In the second case, it was that a test of certain rock drills had been made and that they would bore 50 lineal feet a day in a tunnel which the purchaser was constructing. In that case, referring to *Seitz v. Brewere's Refrigerating Mach. Co.* 141 U. S. 510, greatly relied on by appellant, this court said: "The right of the defendant in that case to set up fraudulent parol representations as to the capacity of the cooling machine furnished to him by the plaintiff was distinctly recognized; but the defense failed, because the evidence failed to establish the alleged fraud." In *Kerrick v. Van Dusen* the representation was that the machine sold would grind 40 bushels of corn an hour.

In each of the three cases cited the representation was regarded as a sufficient basis for a claim of fraud which the court would recognize if established by the evidence. An acknowledged authority on the law of sales says in substance that fraudulent statements often involve the dividing line between statements of fact and of opinion, closely analogous to the same question in the law of warranty. The line is hard to draw, and, in a doubtful case, should be determined by the jury. There is a growing unwillingness on the part of the courts to allow statements to be made without liability, which are calculated to induce, and do induce, action on the part of the hearer. Where a statement is made with fraudulent intent, there is still more reason for regarding it as a ground of liability, even though couched in the form of an opinion, or though it relates to a matter as to which certainty is impossible. *Williston, Sales*, § 628. The language of section 12, c. 465, p. 770, *Laws 1917*—the Uniform Sales Act—is in line with these observations. It defines an express warranty as any affirmation of fact or any promise relating to the goods, if the natural tendency thereof is to induce the buyer to purchase them, and he does purchase, relying thereon. However, section 12 does declare that no statement of the seller's opinion only shall be construed as a warranty.

2. Defendant contends that, if it misrepresented the machine, plaintiff must have known it when he paid his note on May 25 and, if so,

should be held to have accepted the machine, so he could not thereafter be heard to assert that he relied on the alleged false representation. *Meland v. Youngberg*, 124 Minn. 446, 145 N. W. 167, Ann. Cas. 1915B, 775, is cited in support of this proposition, but is not in point. We cannot assent to the conclusion that, by using an ice machine for 25 days in the month of May, a butcher would certainly discover that it would not keep the temperature low enough to preserve meat, if such was the fact. But, conceding that it did appear that plaintiff had made the discovery when he paid his note, he ought not to be turned out of court solely for that reason. He paid \$250 when the machine was installed. The remainder of the purchase price was payable in instalments. The rule is that, where a party to a contract has partially performed it before discovering the falsity of the representation which induced him to enter into it, he is not obliged to retrace his steps, but may complete performance without waiving the fraud and then bring an action for damages for deceit. *Humphrey v. Sievers*, 137 Minn. 373, 163 N. W. 737; *Townsend v. Jahr*, 147 Minn. 30, 179 N. W. 486; *Dawson v. Thuet Bros.* 147 Minn. 429, 180 N. W. 534.

The learned trial court did not err in granting a new trial and the order appealed from is affirmed.

IN THE MATTER OF THE APPLICATION FOR THE REMOVAL
OF THOMAS MOHN FROM THE POSITION AND OFFICE
OF ATTORNEY AT LAW OF THE STATE OF
MINNESOTA.¹

July 8, 1921.

No. 20,299.

Disbarment of attorney — evidence not sufficient.

The evidence submitted is not sufficient to sustain the charges of misconduct made against the respondent, an attorney at law.

¹Reported in 184 N. W. 14.

Eli Southworth, as a member of the State Board of Law Examiners, filed a complaint against Thomas Mohn on account of the latter's conduct as an attorney at law in violation of his duty and for wilful misconduct in his profession.

H. V. Mercer, for petitioner.

Frank M. Wilson, A. J. Rockne, Albert Schaller and W. H. Gillitt, for respondent.

HALLAM, J.

This is an application for the removal of Thomas Mohn from his office as attorney at law. The charge is that sometime during the year 1913 he affixed his signature as attesting witness to a codicil to the will of Mrs. Emma M. Hack, after the death of Mrs. Hack, and thereafter used the codicil as so attested in procuring the settlement of a lawsuit. The charge was made by a witness on the stand in a lawsuit in November, 1915. The petition in this proceeding was filed in January, 1917, and the court promptly ordered a reference for the taking of testimony and appointed attorneys to prosecute the case. After the lapse of more than four years the matter was presented to this court.

Respondent was admitted to the bar of Minnesota in 1897, has practiced in Goodhue county ever since, and in Red Wing since 1905. He was twice elected county attorney of Goodhue county and was holding that office at the time of the alleged misconduct. It is conceded that he is a capable lawyer, has enjoyed a large practice, and, save for this charge, has borne a good reputation.

John Hack has for many years been a citizen of Red Wing and a man of substantial fortune. About 30 years ago, then a man of about 65, he married Emma M. Gallasch, a woman about half his age. Soon thereafter he became blind. In the course of years a large part of the family property found its way into the name of Mrs. Hack and on her death on April 24, 1913, a substantial part of the property which had belonged to Mrs. Hack was found in the name or possession of Eugenia Gallasch, a sister of Mrs. Hack. The only testamentary remembrance by Mrs. Hack of her husband was that in a certain contingency, her father would "take well care" of him "and give him all the comforts he needs in his natural life and pay all his personal expenses."

In August, 1902, Mrs. Hack prepared a will and one day stepped into

a store in Red Wing and signed it and asked two men of her acquaintance there present to sign as witnesses, and they did so. This will gave all her estate to her sister Eugenia, and her brother, Adolph G. Gallasch. In 1911 her brother died. Under date of September 3, 1912, Mrs. Hack wrote, in her own handwriting, a second will complete in itself, but reciting that "this writing be added to my as in part to the will I made on the second day of August, 1902." This will is spoken of in these proceedings as the "codicil" and is the document respondent is charged with mutilating.

The so-called codicil consists of three pages. The writing on the first and second completely fills the pages. The second page closes with the words: "This is my last will and only a codicil to my previous will of August 2nd, 1902," and is signed: "Emma M. Hack." The third page contains, in the middle of the page, matter apparently an afterthought and is signed at the end but near the middle of the page: "Emma M. Hack." Below the signature is written: "This is my last will composed of three papers and my name.

Signed by myself (Maggie Stewart is witness)

(Thomas Mohn is witness)

Emma M. Hack, Red Wing, Minn.

Thomas Mohn

Maggie Stewart."

Maggie Stewart was a servant in the Hack home. It is conceded that she signed as a witness at or about the time Mrs. Hack signed the document and that respondent did not sign and was not present at that time. It is conceded that he did thereafter affix his signature. Petitioner claims that he did so after Mrs. Hack's death, respondent that he did so during Mrs. Hack's lifetime and in her presence and at her request. This is the question in the case.

The 1902 will was presented for probate by Miss Gallasch in May, 1913. It was contested by the husband of deceased. It was undoubtedly intended by Mrs. Hack as her will, but probate was refused because of some alleged defect in the execution. An appeal was taken to the district court. Respondent was attorney for Miss Gallasch and he had taken the case on a contingent fee. After the appeal was taken, this codicil was produced by respondent and was used in the interest of Miss

Gallasch in negotiations which followed for a settlement of the case. The case was settled before trial in the district court. Later respondent and Miss Gallasch fell out over the matter of respondent's fees and matters in connection with the settlement. John Hack commenced an action to set aside the settlement. Several other actions between the Hacks and Miss Gallasch followed in rapid succession. It was in one of these actions that Miss Gallasch, testifying about two years after the codicil was first produced, made the charge on which this proceeding is based.

The testimony of Miss Gallasch and of Maggie Stewart is to the effect that they found this codicil in a safe at the Hack home a short time after the will had been found and taken to respondent, that these two and Hedvig Federle, a young lady relative of Miss Gallasch, who had studied law, together took the codicil to respondent, that he looked it over and told them that it was of no value because it had but one witness. Miss Gallasch testified that she did not examine the codicil, but Maggie Stewart testified that she did and that hers was the only attesting signature at that time. Maggie Stewart testified that the codicil produced by the three ladies in respondent's office was the same codicil which was afterwards produced by respondent with his signature affixed.

Respondent's story is that Miss Gallasch and Miss Federle did bring to him a document purporting to be a codicil executed in the name of Mrs. Hack, but that it was not the same document as now bears his signature; that the signature of Mrs. Hack to the codicil brought to his office had been affixed by Miss Gallasch; that she stated that she had affixed it at the direction of Mrs. Hack, and that it was witnessed by Maggie Stewart and no one else. He testified that the codicil signed by him had the following history: That on February 25, 1913, he was called to the home of Mrs. Hack to give legal advice; that, while he was there, she produced this codicil which was signed by Mrs. Hack and already witnessed by Maggie Stewart, and asked him to sign it as a witness; that he advised her to have a new will prepared and she said she would, but on her insistence he did sign the codicil as a witness; that, after the will had been presented for probate and disallowed, this codicil was found by his brother and law partner, Albert Mohn, in a bank book of deceased and among some of her papers in a vault of a Red Wing bank.

The testimony is in direct conflict. For the petitioner there is the testimony of Miss Gallasch and Maggie Stewart. Miss Gallasch's testimony is much discredited. We need only mention one or two of many impeaching circumstances. It is in evidence that Judge Converse, in a memorandum attached to a decision in one of the cases tried, said that Miss Gallasch's testimony was of little assistance to him save as it was corroborated by other credible evidence. Judge Erickson, probate judge of Goodhue county, expressed himself similarly after a hearing in which she testified. For example, he said that on one occasion she asked his leave to make an important insertion of figures in an inventory which she had previously filed in his court, and, after considerable discussion, she made the insertion, and that afterwards, while on the stand as a witness before him, denied that she had made the insertion or that she had ever asked to do so and said that she thought Mr. Mohn had inserted the figures. There is also testimony of a witness, Mr. Fox, a reputable man, that he overheard a quarrel between respondent and Miss Gallasch in respondent's office over a demand of Miss Gallasch for the return of a portion of a fee he had charged, and that in that controversy she said: "If you don't give us some money, we will fix you," and when he asked: "What can you do," she said: "Two women can do a good deal against one man." We are not disposed to accord to Miss Gallasch's testimony any substantial probative value.

The testimony of Maggie Stewart is positive and generally consistent. It is, however, impeached by the testimony of Mr. Pidgeon, one of the attorneys for Mr. Hack in the will contest. He said that, after the production of the codicil signed by respondent, he made investigation in regard to it, and to that end sought out Maggie Stewart, and that she, knowing the purpose for which he inquired, told him the codicil was all right. She denied this, but Mr. Pidgeon could hardly be mistaken. In another part of Mr. Pidgeon's testimony, he said she besought him to bring about a settlement and seemed concerned about it, and that he then asked her about the codicil and that "she said, that is all right, passing it off in that way." He says that he did not interrogate her about the witnesses to the codicil and that she said nothing about it when the names of the witnesses were written.

Against this testimony is the testimony of respondent, that of his

brother as to the finding of the codicil, and the testimony of Hedvig Federle. This lady testified to the finding of a codicil by Miss Gallasch and that she and Miss Gallasch took it to respondent's office and that Maggie Stewart was not present. Her testimony is not always frank and sometimes evasive, but, on being shown a photograph of the codicil in controversy, she testified very positively that it was not the same codicil that she and Miss Gallasch had taken to respondent's office, and she pointed out provisions in the photographic copy exhibited to her which she said she was positive were not in the codicil she had seen.

We have had some difficulty in reconciling respondent's conduct with his claims.

When he learned that this charge was made against him he sent to a reputable firm of attorneys in Red Wing, copy of alleged charges which he said he proposed to prefer against them. There is no suggestion that the retaliatory charges were well founded.

He sent for Maggie Stewart on several occasions on pretexts, some apparently subterfuges, and his conferences with her were not such as to inspire confidence in his cause.

On one occasion a detective played a discreditable part, his object apparently being to help respondent and to foment trouble between Miss Gallasch and Maggie Stewart.

After this charge had been made against him, he refunded \$5,000 of the fee he had received from Miss Gallasch. He explains this on the theory that the settlement which he negotiated did not settle the controversy, and he realized that there was some ground for the contention that he had not fully performed the contract under which the fee was paid.

Respondent was asked to appear and did appear before a committee of the state bar association and told his story. He did not there mention the existence of a second codicil. It should, in justice, be said, however, that he had before that time mentioned the second codicil to one of the attorneys engaged in the Hack family litigation.

On the other hand, we are troubled to find any sufficient motive for so grave a crime. The codicil gave nothing to respondent's client that was not given her by the will of deceased. The will had been disallowed by the probate court, but from the record before us it seems hardly

possible that the decision could have been sustained on appeal. The probate judge seemed overcome by the apparent want of equity in the will.

If the will was invalid, it was because of defects in attestation which applied with equal force to the codicil. It is true the codicil seems to have been used in bringing about a settlement of the will contest, but of so little real avail would it have been in court that it would at least seem strange that an experienced lawyer would deliberately mutilate or alter it, knowing all the time that three persons, none intimates, and two of them nearly total strangers to him, would have full knowledge of his act.

The matter is an important one both to respondent and to the public. We have considered the evidence with great care and we have arrived at the conclusion that it is not sufficient to warrant us in sustaining the charges made in the petition.

BROWN, C. J. (dissenting).

The evidence shows that respondent knowingly made use of the invalid or defectively executed will to effect a settlement of the estate of Mrs. Hack favorable to his client and his own contingent fee. He should receive the punishment due for his misconduct. The veracity and intelligence of the witness Stewart, in my judgment, conclusively appear, all doubts on that score being completely removed by the conduct of respondent and those in his service in attempting by means strongly to be censured to discredit her as a witness. *State v. Ettenberg*, 145 Minn. 39, 176 N. W. 171.

I therefore dissent.

LOST RIVER NORWEGIAN EVANGELICAL LUTHERAN
CONGREGATION AND OTHERS v. JACOB E. THOEN
AND ANOTHER.¹

July 8, 1921.

No. 22,301.

Religious corporations — division of property by court.

1. The court has power to make an equitable division of the property

¹Reported in 183 N. W. 954.

of a religious society when its members separate by mutual consent, owing to an honest difference of opinion, and both parties still adhere to the faith or doctrines of the church and agree upon and attempt to make a division of the property, which is invalid for want of the notice required by section 6598, G. S. 1913.

Seceders forfeit right in property.

2. Members who secede from a religious society forfeit their rights in the church property.

Division proportionate to numbers.

3. In case the members separate because of honest differences of opinion, but both parties still adhere to the doctrines of the church, the court may divide the property between them in proportion to their numbers at the time of the separation.

Division proper, even if not asked for.

4. A division on that basis was proper, though not asked for by either party when the aid of the court was sought to set aside deeds of the property which were executed to accomplish the division which had been agreed upon.

Action in the district court for Polk county to recover possession of certain premises; \$100 damages for withholding the same; \$25 per month for use and occupation thereof and to cancel deeds and their record as a cloud on plaintiffs' title. The case was tried before Watts, J., who made findings and ordered judgment in favor of plaintiffs that defendants are entitled to retain possession of the church on the condition stated at the top of page 383, *infra*. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

Ole J. Vaule and William P. Murphy, for appellants.

K. T. Dahlen, for respondents.

LEES, C.

The Lost River Norwegian Evangelical Lutheran Congregation, one of the plaintiffs in this action, is a religious society incorporated under the laws of this state. The other plaintiffs are its trustees. The defendant Chester Norwegian Evangelical Lutheran Congregation is also a religious society similarly incorporated. In February, 1919, the defendant Thoen obtained a deed of the church property of the Lost River

congregation and subsequently conveyed the property to the Chester congregation. His deed was signed in behalf of the corporation by the president and secretary, and not by the trustees nor by their authority. This action was brought to cancel both deeds and recover possession of the property. The defense was that on January 30, 1919, the members of the Lost River congregation met and agreed that a minority of their number might sever their connection with the congregation and that the property should be divided, the parsonage and 40 acres of land to go to the majority who were to continue to compose the congregation, and the church to go to the minority; that all the members should retain their rights in the cemetery; that the funds of the church societies should also be divided, and that the church had been duly conveyed pursuant to such agreement.

The case was tried by the court without a jury. The findings set out the articles of incorporation of the Lost River congregation. One article states the doctrinal beliefs essential to membership. Another contains a provision that, in case of a division or schism within the corporation, the property shall belong to those who remain faithful to the religious tenets and doctrines stated in the articles. The court found that the congregation, from the time of its incorporation, was affiliated with the Synod for the Norwegian Lutheran Church of America; that prior to 1917 there were two other denominational societies of the Norwegian Lutheran Church, one called the Hauges Synod, and the other the United Norwegian Lutheran Church of America, and that the doctrines of the three societies were substantially the same; that in 1917, for the purpose of uniting the three societies, they organized a Minnesota corporation known as the Norwegian Lutheran Church of America. Thereafter a question arose respecting the relation which the Lost River congregation bore to the new corporation. At a meeting of its members in August, 1917, a motion that the congregation sever all connection with the new corporation was voted on and lost. On January 16, 1919, an informal ballot relating to the same question was taken, and a majority voted in favor of uniting with the new corporation. At a meeting held on January 30, 1919, by a vote of 22 to 6, the members decided that the congregation should join the new corporation. Thereupon the defendant Thoen

and eight others presented in writing a declaration reading in part as follows:

"We * * * declare that we, for conscience sake are convinced that we are justified in claiming to be the Lost River congregation and therefore have the right to all the property of the congregation, still, we are willing, in order to avoid possible lawsuit, to sever our connection with the congregation on the following conditions:

"1st. That the property of the congregation be divided so that we are allowed to keep either the church and the roads to the church, or the parsonage.

"2nd. That whether we keep the church or the parsonage we shall have full right to the cemetery.

"If the majority is unwilling to accede to * * * these conditions, it is our fixed intention to remain as Lost River congregation and continue its work in accordance with its organic law and confession."

By a vote of 16 to 2 (the signers of the declaration not voting as we were informed by the oral arguments), a resolution for a division of the property was adopted. It was resolved to transfer the church to the minority party, and the officers of the congregation were directed to execute the conveyance. Accordingly, on February 7, 1919, the deed to Thoen was made. He took it in trust for the minority, and when they had incorporated he conveyed the property to the defendant corporation. On March 3, 1919, the minority party presented a written statement, declaring that they thereby severed their connection with the congregation, on condition that the division of the property agreed to at the meeting of January 30 be recognized. It was voted to accept such withdrawal and resolved that the advice of the president of the district and of an attorney be obtained to ascertain what should be done if the congregation should lose the church.

The court found specifically that the two parties separated by mutual consent and that both claim to have maintained adherence to the faith, doctrines and discipline of the church according to the articles of incorporation. There is no finding that such claims were not justifiable. Under the division agreed upon, the minority received property and money of the clear value of \$1,399, while that retained by the majority was of the value of \$2,150. The court held that the deeds were void, but

that defendants were nevertheless entitled to retain possession of the church until a sum was paid to the members of the minority party, bearing the proportion to the net value of all the property and funds that 11 bears to the whole number of members immediately before the separation occurred. The reason given for so holding was that the notice required by section 6598, G. S. 1913, had not been given and, in its absence, a conveyance of the property was unauthorized, but, since there had been a separation of the membership by mutual consent, both parties still adhering to the tenets and discipline of the church, a division of the property between the two parties in proportion to their numbers was justified. The minority party numbered 11, but the total membership of the congregation was not shown. The court suggested that proof thereof might be supplied, but it was not. Plaintiffs moved for a new trial and appealed from an order denying their motion.

We need not decide whether the withdrawal of the minority was such a schism as is referred to in the articles of incorporation or defined in *Lindstrom v. Tell*, 131 Minn. 203, 154 N. W. 969. The point is not covered by the findings and we do not know what the evidence showed, for there is no settled case. The one question before us is whether the conclusions of law are supported by the findings of fact. The answer depends on the effect on property rights of an amicable separation of the membership of a church into two independent bodies, coupled with an agreement to divide the property, acted upon by the parties thereto but invalid because of some legal technicality. The question was touched on in *Schradi v. Dornfeld*, 52 Minn. 465, 55 N. W. 49, where it was said that the members are not to be treated as partners, entitled upon a dissolution to a division of the property. So long as the property is appropriated to the purposes for which they associated and none are prevented from participating in its use, the majority control in the management thereof, in the absence of a different rule lawfully established. While the individual members have no interest in the property which they can take with them if they withdraw, yet, in case of an amicable or other lawful separation of the membership, the court may interfere to make an equitable division of the property.

Members who secede from a religious society forfeit all right to any part of the church property. Whether there has been a secession or not

is a mixed question of law and fact to be decided with a view to all the circumstances, including the acts of the parties and the motives by which they were prompted. *Wiswell v. First Cong. Church*, 14 Oh. St. 32; *Hale v. Everett*, 53 N. H. 980, 16 Am. Rep. 82.

In case of a schism, the party remaining loyal to the faith or doctrines of the church is entitled to hold all the property devoted to the propagation of the doctrines of the church. *Lindstrom v. Tell*, *supra*; *Baptist City Mission Soc. v. Peoples Tabernacle*, 64 Colo. 574, 174 Pac. 1118, 8 A. L. R. 102, and note p. 113.

Some courts hold that, upon a division of the membership by reason of honest differences of opinion, both parties still adhering to the tenets, doctrines and discipline of the organization, their common interest in the property continues and their rights may be adjusted fairly and equitably according to the discretion of the court. It may properly be divided between them in proportion to their numbers at the time of the separation. See note to *Baptist City Mission Soc. v. Peoples Tabernacle*, 8 A. L. R. p. 132; *Hale v. Everett*, *supra*; *Wiswell v. First Cong. Church*, *supra*; *Immanuel's Gemeinde v. Keil*, 61 Kan. 65, 58 Pac. 973; *Huffhines v. Sheriff (Okla.)* 162 Pac. 491; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Niccolls v. Rugg*, 47 Ill. 47, 95 Am. Dec. 462; *German Cong. Church v. Deutsche Gemeinde*, 246 Ill. 328, 92 N. E. 868. In deciding the present case the trial court seems to have been guided by the cases last cited. We do not here express approval or disapproval of their doctrine. Neither do we stop to consider whether the final paragraph of the opinion in *Schradi v. Dornfeld*, *supra*, amounts to a qualified approval of the doctrine.

The specific finding that the two parties mutually agreed upon a division of the church property, and the fact that they acted upon the agreement and that their action would have been valid and binding if the requirements of section 6598, G. S. 1913, had been complied with, lead to the conclusion that the district court correctly disposed of the case.

Concretely stated, appellants' position is that the minority have voluntarily withdrawn from and are no longer members of the church, and, under the doctrine of *Schradi v. Dornfeld*, *supra*, cannot take any of the property with them. That would be true if they were seceders from the church, but they did not secede.

When once the power of the court to make a division of church property is granted, as it must be under the particular circumstances of this case, little basis is left for criticism of a division in proportion to the membership of the majority and minority parties, respectively. When only personal property is involved, it seems clear that a religious society will be concluded by a division of the property agreed upon. Because no disposition of real property owned by such an organization may be made until notice has been given as required by section 6598, G. S. 1913, as interpreted in *Trustees v. Froislie*, 37 Minn. 447, 35 N. W. 260, it does not follow that the court, in a proper case, may not accept a division agreed upon by the parties as the basis of its action. When the aid of the court is sought to regain possession of property parted with pursuant to such an agreement, it may, in the exercise of its equitable powers, award to the defendant all or part of the property received under the agreement. The division which was agreed upon in the present case gave the minority a greater interest in the property than the court gave them. The corporation, since the withdrawal of the minority of its members, is composed of those who were willing to divide the property less advantageously to themselves than the court has divided it, and, therefore, neither they nor the corporate entity representing them ought to complain. It is true that the pleadings did not ask for a division of the property. Plaintiffs asked that they be adjudged the owners of all of it; the defendant corporation, that it be allowed to retain what it had received. But the court was not bound to give judgment in accordance with the demand of either party. It was within its power to exercise its own judgment in making a division upon the equitable basis outlined in the decisions above cited.

The order denying a new trial is affirmed.

CARRIE SCHMITZ v. WILLIAM MARTIN, SUBSTITUTED IN
PLACE AND STEAD OF AGNES ELIZABETH MARTIN,
DECEASED.¹

July 8, 1921.

No. 22,302.

Action to set aside final decree of probate court.

1. An action may be maintained in a district court to set aside a decree of a probate court on the ground of fraud.

Finding sustained by evidence.

2. The evidence is sufficient to sustain a finding of the court that plaintiff was the wife and sole heir of Paul Schmitz, a devisee under the will of Michael Schmitz.

Finding that decree was obtained by fraud sustained by evidence.

3. Paul died after the death of Michael. Agnes, a daughter of Michael and sister of Paul, after the death of Paul, procured from the probate court a decree assigning the share of Paul to their mother, with the result that after the mother's death it descended to Agnes. There is evidence that Agnes knew that plaintiff was the surviving wife of Paul. The decree was procured without the knowledge of plaintiff, on representation that Paul died without issue, and without revealing to the probate court the existence of plaintiff. The evidence is sufficient to sustain the decision of the court that the probate decree was procured by fraud.

Action in the district court for Le Sueur county to set aside a decree of the probate court for that county. The facts are stated in the opinion. The case was tried before Tift, J., who made findings and ordered judgment in favor of plaintiff. From an order denying the motion of the substituted defendant for a new trial, he appealed. Affirmed.

Thomas Hessian, for appellant.

W. H. Leeman, for respondent.

¹Reported in 183 N. W. 978.

HALLAM, J.

Michael Schmitz was for many years a resident farmer of Le Sueur county. In 1882 he made a will in which he gave his farm to his wife, Anne Mary, for life, and on her death to their son, Paul, and their daughter, Agnes, share and share alike. Michael died in October, 1898. About 1911 Paul died. In October, 1912, Agnes, then Agnes Martin, presented her father's will for probate, procured it to be probated and procured a final decree of the probate court, assigning the land, subject to the mother's life estate, in equal proportions to herself and to her mother, on the theory evidently that the mother was the sole heir of Paul.

The mother later conveyed her interest to Agnes. The mother is now dead. After her death, plaintiff, claiming to be the widow of Paul, commenced this action in the district court against Agnes to set aside the probate decree on the ground that it was obtained by fraud. During the pendency of the action Agnes died and William Martin was substituted as defendant in her stead. The court found for plaintiff. Defendant appeals.

1. Defendant contends that the probate decree is a judgment "conclusive against the world" and "immune from attack." It is indeed a judgment of a court of general jurisdiction and in general it may be said "it is undoubtedly final unless reversed, and concludes all parties interested as to everything necessarily involved in the decree." *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99, 69 L.R.A. 785. It has the same force and effect as a judgment of the district court. But, like a judgment of the district court, it may be assailed and set aside in a direct proceeding for that purpose, on the ground of fraud. *Leighton v. Bruce*, 132 Minn. 176, 156 N. W. 285; *Robinson v. Thomson*, 137 Minn. 446, 163 N. W. 786; *Savela v. Erickson*, 138 Minn. 93, 98, 163 N. W. 1029.

2. This action is predicated on fraud, and, if the fraud is established, the action may be maintained. The question then is did plaintiff's evidence establish fraud? Of course this involves the further question whether plaintiff has established the fact that she was the wife of Paul Schmitz, for, if not, she could have no possible rights in the property at all. The court found that plaintiff was the wife of Paul. We

think the evidence on this point sufficient to sustain the finding. Plaintiff testified that she married Paul Schmitz in 1878; that she lived with him in Michigan until his death under the name of Smith; that Agnes Martin was her husband's sister; that Agnes had visited them in Michigan and she had visited Agnes and her mother in Minnesota; that they had corresponded back and forth. This evidence was given in June, 1918. Agnes was then ill. The case was continued and was taken up again in September, 1919. In the meantime, and not earlier than December 25, 1918, Agnes died. There was no denial of plaintiff's testimony. The testimony of Agnes was never taken, although she lived at least six months after plaintiff's testimony was given, and during that time was able to deed her interest in the property to the present defendant. It appears from the evidence that Agnes had children. No member of the Martin family denied plaintiff's testimony. The record of the death of Paul, in the office of the clerk of the court in the county where he resided, misstates the name and residence of both his father and mother, but it does not appear on what information this record was made, and it is not conclusive against plaintiff.

3. The evidence of fraud is not direct. It appears, however, that Agnes made the petition for probate of the will, and in it stated that Paul had died without issue, gave the names of herself and her mother as all of the heirs and devisees of her father, and made no mention of plaintiff. The decree contained the same recital, contained no reference to plaintiff, and assigned the estate as above mentioned. The decree was obtained without the knowledge of plaintiff. If, as the court properly found, plaintiff was the wife of Paul, she was entitled to the portion of the father's estate that was willed to Paul. It is a permissible inference from the testimony that Agnes knew that plaintiff was the surviving wife and heir of Paul and that she concealed that fact from the probate court, and wrongfully procured a decree diverting this share of the property from plaintiff to the mother, with the result that it descended to Agnes on the mother's death.

Order affirmed.

T. B. BERRY AND ANOTHER v. JOHN ROTH AND ANOTHER.
JOHN ROTH, APPELLANT.¹

July 8, 1921.

No. 22,307.

Broker — rescission of contract made in agent's name — recovery for fraud.

The plaintiffs, in the name of one of them as vendee, made a contract to purchase lands. The other party to the contract, as vendor, was the agent of the owner. The agent then made a contract to purchase of the owner. It was the understanding that the plaintiffs were the purchasers and the owner the seller. The two contracts were made as a part of the plan for effecting a sale and passing title. The agent by agreement with his principal was to have all of the sale price in excess of a fixed sum. The plaintiffs paid a part of the purchase price. The sale was induced by the fraud of the owner and his agent. It is *held* that the plaintiffs can maintain an action to rescind the contract made in the name of the agent as vendee and can recover of both defendants the amount which they paid to the agent in consummating the transaction and that they are not limited to a recovery from each of the amount received by him.

Action in the district court for Pine county to cancel a contract for the sale of land for fraud and to recover \$1,000. The case was tried before Molyneaux, J., who made findings and ordered judgment in favor of plaintiffs, canceling the contract and for \$2,000. From the judgment entered pursuant to the order for judgment, John Roth appealed. Affirmed.

Einar Hoidale, for appellant.

George Nordlin, for respondents.

DIBELL, J.

This action was brought against John Roth and A. L. Huston to cancel for fraud a contract made in the name of Huston, as vendor, with

¹Reported in 184 N. W. 274.

P. A. Berry, and one of the plaintiffs, as vendee, for the sale of lands in Pine county, and to recover from both defendants the amount which the plaintiffs paid. There were findings and judgment for the plaintiffs and the defendant Roth appeals.

In 1918 John Roth was the owner of 240 acres of land in Pine county, and his son owned an 80, making up the half section, which had been deeded to him by his father some little while before. Roth was anxious to sell, and it was understood between him and his son that the son's 80 would be put in with the rest to make up the half section. The defendant Huston was a land agent. Roth listed the half section at \$35 per acre net to him, Huston, as his agent, to receive as commission all of the sale price in excess. The plaintiffs were shown the land by both defendants. They understood that Roth was the owner. They claim that both of the defendants made false representations as to the character of the lands such as would justify a rescission, or an action for damages. The court so found. The defendant makes no question of the sufficiency of the evidence to sustain the finding.

On February 8, 1919, Huston made a contract in his own name to sell the land to P. A. Berry, one of the plaintiffs. The understanding was that the two plaintiffs were making the purchase. It was also understood that Roth was the owner and the real seller. On February 21, 1919, Huston, to carry out the deal, took a contract from Roth to himself. Huston was Roth's agent. It was not understood that he was the purchaser. Roth received a part of the first payment and his son a part and the rest of it went to Huston. They had a satisfactory understanding as to how payments were to be applied.

The defendant claims that, since the action is one of rescission, the plaintiffs can recover only from Huston who received the money, or in any event can recover no more from the defendant appealing than the amount which he received. This contention we do not sustain.

The contract between Huston and Berry and the subsequent contract between Roth and Huston were parts of the general plan of effecting and completing the sale and passing title to the plaintiffs. Under the finding of the court it was the fraud of Roth and Huston which induced the sale. The contract, unless it was annulled, compelled performance by the plaintiff. Unless they were content to keep the land and sue

for damages for the fraud, or keep the land and forego damages, it was necessary that they rescind. The rescission properly resulted in a decree for the repayment of the money which they had paid, and it is no unjust hardship upon Roth that he, as a party to the fraud and the real vendor, be required to refund the moneys obtained by him and his agent. No rule of law forbids such recovery. The granting of the contention of the defendant compels the plaintiffs to take a rescission of their contract with a money judgment for damages against Huston alone, or against Huston for a part and against Roth for a part; or, to keep the land, abide by the contract induced by fraud, and have damages appropriate to an action of deceit, or forego damages. That the final contract was made between Huston and P. A. Berry, and a second one between Huston and Roth, both for the purpose of carrying out the sale, instead of one contract directly with Roth, is unimportant. The defendants fraudulently induced the purchase, it was a purchase by the plaintiffs and not a purchase by Huston and a subsequent sale to the plaintiffs, and a judgment for a rescission with judgment against Roth as well as against Huston for the money with which the plaintiffs were fraudulently induced to part was proper.

The material findings of the trial court are sustained and the law was correctly applied.

Judgment affirmed.

LOUIS G. GATES AND B. A. MAN v. HERBERT S. GATES.¹

July 8, 1921.

No. 22,327.

Alteration of will by witnesses.

1. It is not necessary under our statutes that witnesses to a will sign as such in the presence of each other, though each must sign at the instance, express or implied, of the testator and in his conscious presence.

¹Reported in 133 N. W. 958.

Findings supported by evidence.

2. The evidence made the question whether there was a legal and sufficient attestation of the will here involved one of fact, and the findings of the court thereon are sufficiently supported by competent proof.

Rulings on evidence.

3. The record presents no error in the rulings of the admission or exclusion of evidence.

Herbert S. Gates filed objections in the probate court for Winona county to the allowance of the will of George L. Gates, deceased. After hearing, the court, Looby, J., disallowed the probate of the will. From the order of disallowance, Lewis G. Gates and B. A. Man appealed to the district court for that county. The appeal was heard by Callaghan, J., who made findings and reversed the order of the probate court. The motion of Herbert S. Gates for amended findings and conclusions was denied. From the judgment entered pursuant to the order for judgment, Herbert S. Gates appealed. Affirmed.

Theo. Christianson and Brown, Abbott & Somsen, for appellant.

Webber, George & Owen, for respondents.

BROWN, C. J.

George L. Gates, a physician and surgeon of Winona, this state, died on July 3, 1920, leaving what purported to be his last will and testament, by which he made specific disposition of his property and effects. The will was duly submitted to the probate court for allowance, to which Herbert S. Gates, a nephew of testator, interposed formal objections on the ground, among others, that the will was not the last will and testament of decedent, because not executed in conformity with the requirements of the statutes in such case made and provided. After due hearing in the probate court, it was held that the will was defectively executed and it was disallowed and probate refused. On appeal to the district court the order of the probate court was reversed, the court holding that the will had been properly executed. Judgment was so entered in the district court, from which contestant appealed.

The principal question presented is whether the evidence is sufficient to justify the conclusion that there was a legal attestation of the

will. We answer it in the affirmative. The facts are not in dispute and therefore the trial court was fully warranted in upholding the will. The testator, Dr. Gates, was a physician and surgeon of many years practice at Winona; his mental capacity is not challenged, nor is it suggested that the document in question, which purports to be his last will and testament, is not such in fact. It was prepared by an attorney at his office pursuant to directions given by the testator, and then taken by the testator to his own office, across the street from that of the attorney, for formal execution. It was there signed by him in the presence of his business associate, Dr. Muir, who subscribed the same as a witness. The parlor maid, Jennie Weir, who had been in the service of testator at his offices for several years, was then called in and requested to sign as the second witness, and she did so. The will then lay exposed on the office desk of Dr. Muir, the other witness. Testator stood at one end of the desk and Dr. Muir at the other. Miss Weir noticed the signatures of testator and Dr. Muir and testified that they were genuine; she knew the handwriting of each. The evidence taken as a whole justified the trial court in finding as a fact that Miss Weir knew that the document so signed by her was the will of Dr. Gates and that she was joining Dr. Muir in its formal execution. Her testimony on the subject is a little uncertain, occasioned no doubt by the fault of memory in recalling a transaction which occurred several years before, but that she knew the document to be the will of Dr. Gates is clear enough. There was no showing of a direct request by the testator that Miss Weir sign as a witness. The request was made by Dr. Muir, but in the immediate presence of testator, no doubt was heard by him, for it was made within his hearing, and her act in complying with the request and signing the will as a witness was in his immediate conscious presence.

On these facts we find no particular difficulty in sustaining the conclusion of the trial court that the will was properly attested and otherwise executed. The rule requiring a reasonably strict compliance with the statutes on the subject has been met and a conformity therewith shown. In the absence of a statute so requiring, it is not necessary that the testator personally request the witness to sign as such. It is sufficient, though requested by the scrivener or other person in the presence of the testator, that he acquiesce therein and accept those thus called

in to act in that capacity. In *re Allen's Will*, 25 Minn. 39; *Madson v. Christensen*, 128 Minn. 17, 150 N. W. 213, L.R.A.1916C, 1214, 1916D, 1101; *Underhill, Wills*, § 191; 28 R. C. L. 127. Nor is it necessary, unless required by statute, that the witnesses sign in the presence of each other. Our statutes do not require that the witnesses so sign. So far as our examination of the authorities has extended, the rule stated is generally followed in this country, though it may be different in England. 1 *Underhill, Wills*, § 197, and citations; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Johnson v. Johnson*, 106 Ind. 475, 7 N. E. 201, 55 Am. Rep. 762; *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089, Ann. Cas. 1915A, 870; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. 875; *Will of Smith*, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756. Dr. Muir, the other subscribing witness, is dead, and his testimony could not be had. The evidence is clear that the will was in fact the will of the testator, consciously made and executed by him; no doubt is cast upon the verity of the transaction by the suggestion of fraud or coercion, and a failure affirmatively to show a literal compliance with the statutory requirements as to form of execution should not prevail against it as a matter of law. The question whether the will was properly executed and attested resolves itself into one of fact or mixed law and fact; the findings of the court thereon are not clearly against the evidence and should be sustained.

The case of *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758, is not in point. There we applied the same rule we apply here and held that the findings in that case that the will was not executed and attested, as required by the statute, were not clearly against the evidence, and could not therefore be disturbed. There was much mystery and secrecy shown in that case, a situation not present in the case at bar. The findings of the trial court, which we sustain, differentiate the case from *Maxwell v. Lake* (Miss.) 88 South. 326. All the court there held was that the question whether the will was properly attested was one of fact and should have been submitted to the jury.

2. The other points made do not require discussion. They relate to the admission and exclusion of evidence upon collateral matters and, if error be present, there is no occasion for reversal for the error was without prejudice. The will is found to have been executed and attested as

required by law, and there the case must end; no other question was presented to the court below.

Finding no error in the record the judgment appealed from will be and it is in all things affirmed.

OSCAR EDBERG v. J. A. JOHNSON.¹

July 8, 1921.

No. 22,330.

Motorcycle policeman not chargeable with negligence.

1. A policeman is not chargeable with a violation of the Motor Vehicle Act solely because, while pursuing a law breaker to place him under arrest, he operates a motorcycle in a manner prohibited by the act.

Statute — construction of legislative intent to avoid absurdity.

2. The intent of the legislature determines the interpretation of a statute, though it seems contrary to the letter of the statute. A construction should be avoided which would result in inconvenience or absurdity.

Police patrol wagons — motorcycles.

3. The words "police patrol wagons," as used in section 2619, G. S. 1913, include motorcycles when operated by policemen in patrolling streets and highways.

Care required of peace officer in performance of official duty.

4. A peace officer, in pursuit of a law breaker, is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

Action in the municipal court of Duluth to recover \$500. The facts are given in the opinion. The case was tried before Funck, J., who when plaintiff rested denied defendant's motion to dismiss, and a jury which returned a verdict for \$400. Defendant's motion for judgment notwith-

¹Reported in 184 N. W. 12.

standing the verdict or for a new trial, was denied. From the judgment entered pursuant to the verdict defendant appealed to the district court for that county. The appeal was heard by Cant, Dancer and Fesler, JJ., who reversed the judgment and remanded the case for a new trial. From the order reversing the judgment and remanding the case, plaintiff appealed. Affirmed.

Andrew Nelson and John Cedergren, for appellant.

John B. Richards and Bert W. Forbes, for respondent.

LEES, C.

Plaintiff was struck by a motorcycle operated by defendant and brought this action in the Duluth municipal court for damages for injuries to his person. He recovered a verdict, and from the judgment entered thereon an appeal was taken to the district court, where the judgment was reversed and the case remanded for a new trial. Plaintiff appealed from the order of the district court.

At the time of the accident, ~~plaintiff~~² was a Duluth traffic policeman, and, mounted on the motorcycle, was pursuing the driver of an automobile, who was exceeding the speed limit. In trying to overtake the offender to put him under arrest, the officer drove faster than the statute permits. Plaintiff was crossing the street and was within a few feet of the curb when the automobile passed behind him. Defendant attempted to come alongside the automobile by running to the right of it. Plaintiff was unaware of the approach of the motorcycle before he was struck. No signals were given and it carried no light. It was dusk, the hour being about 8:30 p. m.

The trial court instructed the jury in substance that the motor-vehicle act was applicable to such a case, and, if defendant disregarded the speed regulations of the act, he was presumptively guilty of negligence. In reversing the judgment, the judges of the district court of St. Louis county, before whom the appeal was heard, expressed their opinion as follows: "A policeman, operating a motorcycle in the performance of his duties as a policeman, is not chargeable with violation of the motor vehicle act. Sections 2619-2648, G. S. 1913. In such a case a motorcycle should be held to be a police patrol wagon. * * * A 'speeder' can-

not be arrested ordinarily without 'speeding' by the officer making the arrest."

Our views coincide with theirs. It would be an affront to the intelligence of the legislature to hold that, in enacting a statute designed to suppress "speeding," it intended to restrict peace officers to the prescribed speed limits when in pursuit of violators of the statute.

In *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204; Ann. Cas. 1917D, 563, this court held that, as a general rule, regulations governing the rate of speed on public streets do not apply to fire apparatus on the way to a fire. The reasons for the rule were suggested in *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62, 36 L.R.A. 305, and *Warren v. Mendenhall*, 77 Minn. 145, 79 N. W. 661. The same reasons apply with equal force to vehicles used by police officers. An officer so engaged is performing a public duty. He cannot successfully perform it, unless he is accorded privileges not possessed by private citizens. He would be seriously hampered if statutory provisions limiting the speed of motor vehicles applied to him while in pursuit of a fleeing criminal. For reasons of public policy, at least one court has felt free to hold that such provisions have no application, even though the statute contained no exceptions in favor of peace officers. *State v. Gorham*, 110 Wash. 330, 188 Pac. 457. In another jurisdiction, a contrary view was expressed. *Keevil v. Ponsford* (Tex. Civ. App.) 173 S. W. 518, and in still another it was held that, in case of military necessity, a statute limiting the speed of motor vehicles should be held inapplicable. *State v. Burton*, 41 R. I. 303, 103 Atl. 962, L.R.A. 1918F, 559. Plaintiff contends that the language of our statute forbids the adoption of the rule stated in *State v. Gorham*, *supra*. The statute reads thus: "The term 'motor-vehicle' as used in this act, except where otherwise expressly provided, shall include all vehicles propelled by any other than muscular power, except traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances, and such other vehicles as run only upon rails or tracks." G. S. 1913, § 2619.

The contention is that the language employed, limits police officers to the use of patrol wagons whenever, in the discharge of their duties, it becomes necessary to exceed the prescribed speed limits and that a motorcycle is not a patrol wagon. We are not impressed by the argument

advanced to support this contention. The statute is not worded as explicitly as it might have been to express the intent the legislature undoubtedly had in mind. Strictly speaking, a motorcycle, operated by a policeman patrolling the streets, is not a police patrol wagon. If the letter of the statute rather than its spirit is to control in its interpretation, the municipal court was right and the district court was wrong. The applicable rules of construction are too well known to justify more than a mere reference to them. The intent of the legislature controls, though it seems contrary to the letter of the statute, and a construction should be avoided which would result in inconvenience or absurdity. 3 Dunnell, Minn. Dig. § 8947. To propel a motor-vehicle at an unlawful rate of speed is a misdemeanor. When the penal code was enacted, the following provision was inserted therein: "The rule that a penal statute is to be strictly construed does not apply to this code or any of the provisions thereof, but all such provisions must be construed, according to the fair import of their terms, to promote justice and effect the objects of the law." Penal Code, § 9, in substance now found in section 8468, G. S. 1913.

To secure the safety of the public is one of the principal objects of the statute. A criminal, seeking to get away from the scene of his crime, commonly travels in an automobile driven at a high rate of speed. There are reckless drivers of automobiles who pay no attention to the speed laws. Both classes of offenders must be overtaken by the officers of the law, if they are to be placed under arrest. As an aid to officers on patrol duty no vehicle more serviceable than the motorcycle has as yet been invented. Of course it is possible for such officers to use automobiles instead of motorcycles, but their use would be equally if not more dangerous to others if driven at a high rate of speed.

Whether the words "police patrol wagons," as used in this statute, include motorcycles, may be open to argument. This court has held, construing the exemption statutes, that a buggy is a wagon, *Allen v. Coates*, 29 Minn. 46, 11 N. W. 132; that a carriage is a wagon, *Kimball v. Jones*, 41 Minn. 318, 43 N. W. 74, and that a bicycle is not a wagon, *Shadewald v. Phillips*, 72 Minn. 520, 75 N. W. 717. Other courts have held that the word "wagon" is a generic term and includes almost any vehicle, whether used for the transportation of persons or

property. *Luce v. Hassam*, 76 Vt. 450, 58 Atl. 725; *Fifth Ave. Coach Co. v. City of New York*, 58 Misc. 401, 111 N. Y. Supp. 759-776; 4 Words & Phrases, 1221 (2d Ser.)

Taking into consideration the objects sought to be attained by the statute, the general use of motorcycles in patrolling streets and highways when the statute was enacted, as well as at the present time, and the evident purpose of the legislature to except from the operation of the statute vehicles employed as instrumentalities of municipal fire and police departments, we hold that motorcycles so employed come within the exceptions made by the statute.

We do not hold that an officer, when in pursuit of a law breaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. What we do hold is that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the motor-vehicle act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances. Order affirmed.

WILLIAM A. GRIEBE v. HENRY C. HAGEN.¹

July 8, 1921.

No. 22,331.

Failure of landlord to repair — measure of general damages.

The measure of general damages for the failure of the landlord to improve or repair rented premises is diminished rental value. Special damages, if recovered, must be alleged and proved. In this case special damages were not alleged and the court properly submitted diminished rental value as the measure of damages. The verdict sustains the finding both as to the right of recovery and the amount.

Action in the district court for McLeod county to recover rent under a farm lease. The answer set up a counterclaim and demanded judgment

¹Reported in 184 N. W. 19.

for \$87. The case was tried before Tift, J., and a jury which returned a verdict for \$613. From an order denying his motion for a new trial, defendant appealed. Affirmed.

William O. McNelly, for appellant.

F. R. Allen, for respondent.

DIBELL, J.

This is an action to recover rent accruing on a farm lease. There was a verdict for substantially the amount claimed. The defendant appeals from the order denying his motion for a new trial.

The amount of the accrued rent was not in dispute. The defendant counterclaimed for damages resulting from the failure of the plaintiff to build a machine shed, whereby he suffered damages in the sum of \$300; for his failure to furnish a suitable house or room for his cream separator, whereby he suffered damage in the sum of \$50; for his failure to repair the house, whereby he suffered damages in the sum of \$100, and for his failure to sow 40 acres in clover, whereby he suffered damages in the sum of \$250. These items aggregated \$700. The defendant alleged that by reason of the specified defaults of the plaintiff the rental value of the premises was diminished \$700. This was the amount which he claimed in his counterclaim. He offered evidence as to the diminished rental value. The fact of a default, except in a minor particular, was denied, and the amount of damages was in issue.

No special damages were pleaded. If recovered they must be pleaded and proved. 1 Dunnell, Minn. Dig. and 1916 Supp. § 2581. The proper measure of general damages for a failure to make improvements or to repair, is that stated in the defendant's counterclaim—diminished rental value. *Long v. Gieriet*, 57 Minn. 278, 59 N. W. 194; *Warren v. Hodges*, 137 Minn. 389, 163 N. W. 739. The question of the recovery of special damages in particular cases recently had thorough consideration in *Force v. Gottwald*, supra, page 268, 183 N. W. 356. The court submitted the rental value measure without objection or subsequent complaint. The finding of the jury is sustained.

Order affirmed.

WILLIAM D. FITZPATRICK v. INTERNATIONAL TYPO-
GRAPHICAL UNION OF NORTH AMERICA.¹

July 8, 1921.

No. 22,334.

Trade union — service of process on member sufficient.

The defendant union, an unincorporated voluntary association, is a trade union, having the interests and welfare of its members as an object. In addition it provides, through dues received, a union printers' home for infirm and invalid members, and old age pensions and death benefits. The cause of action alleged arises from a wrongful refusal to admit the defendant to the home. Under the showing made, as set forth in the opinion, jurisdiction was acquired by service on a member of the defendant as is provided by G. S. 1913, § 7689, for service when two or more do business as associates under a common name.

Action in the district court for Ramsey county to recover \$25,000. Defendant appeared specially and its motion to vacate the service of summons was granted, Michael, J. From the order vacating the summons, plaintiff appealed. Reversed.

O. H. O'Neill, for appellant.

Morphy, Bradford & Cummins, for respondent.

DIBELL, J.

The plaintiff appeals from the order of the Ramsey district court vacating the service of summons.

The defendant, International Typographical Union of North America, is a voluntary unincorporated association having a large membership throughout the United States and Canada. It is governed by a constitution and by-laws. It has a branch or subordinate union known as the St. Paul Typographical Union Number 30. The plaintiff for 20 years has been a member in good standing of the defendant and of the subordinate lodge.

¹Reported in 184 N. W. 17.

Since 1892 the defendant has maintained at Colorado Springs, Colorado, a home for invalid and infirm members. On June 1, 1915, the plaintiff became afflicted with locomotor ataxia and since has been infirm and an invalid. On August 1, 1915, he applied for admission to the home. The defendant, according to the complaint, wrongfully refused him admission. This action is for damages for such refusal.

The defendant has no offices or officers in Minnesota. It has officers and offices in Indianapolis. Service was made in Minnesota on Judson D. Trimmer, a member of the union. The question is whether such service conferred jurisdiction. The applicable statute is G. S. 1913, § 7689, which is as follows: "When two or more persons transact business as associates and under a common name, whether such name comprise the names of such persons or not, they may be sued by such common name, and the summons may be served on one or more of them. The judgment in such case shall bind the joint property of all the associates, the same as though all had been named as defendants."

There are two leading cases in Minnesota, one or the other of which controls. The first to which we call attention is *St. Paul Typothetae v. St. Paul Bookbinders' Union No. 37*, 94 Minn. 351, 102 N. W. 725, 3 Ann. Cas. 695. The defendant was an unincorporated voluntary association. It was organized to promote the interests of its members. It had no business functions. Whether it could be sued in its association name was one question. After referring to the common law rule that such an association is not a legal entity apart from its members the court said (p. 359): "This rule applies to the union, unless it comes within the scope of the statute G. S. 1913, § 7689, providing for actions against persons doing business under a common name. The statute, it is clear, was not intended to include associations of this character. Its purpose was to authorize the courts to take jurisdiction over unincorporated associations engaged under a common name in some sort of business in which property is bought and sold, debts contracted—concerns owning and holding property, and incurring pecuniary liability—and not associations of the character of labor unions, having no property, engaged in no business occupation, in a proper sense of the term, and whose only function is the promotion of the interests and welfare of the persons who are members thereof." And in referring to this general class of organizations

the court said: "Such organizations are properly divided into two classes, viz. those organized for the purpose of conducting some business enterprise, and those whose purpose is solely the promotion of the interests and welfare of their members, unaccompanied by any business functions. As to this class, it would seem that the law of principal and agent should apply."

The other case is *Taylor v. Order of Railway Conductors*, 89 Minn. 222, 94 N. W. 684. There the question arose on an appeal from an order denying a motion to set aside the service of summons. The defendant was a voluntary association composed solely of men engaged as conductors on steam service railroads. It was a fraternal organization and had local divisions in several localities. Its mutual benefit department was a distinct organization, except that it was composed of men who, when they became members of the benefit department, were also members of the order. Moneys of the order and the benefit department were kept separate. The benefit department had no agents or representatives in Minnesota. It had in Iowa where its business was carried on. It was held that service on a member, one Kelly, was good service under the statute which we have quoted, and gave jurisdiction. The court said: "It was further urged upon the argument here that the facts that the defendant had no office in this state, and that Kelly was not one of its agents or officers, did not authorize the service in any other way than as required upon nonresident corporations. There would be force in this view but for the plain terms of the statute we have quoted above which clearly authorizes service upon an associate of any organization doing business under a common name, without any restriction dependent upon the place of its business, the location of its offices, or other conditions, save that the service must be made as therein authorized. There is no claim of fraud in making the service, and no denial that Kelly, the person served, was a member of defendant's association, and was within the state at the time. It was admitted in the brief of counsel that the Order of Railway Conductors embraced practically all the conductors in the country, many of whom must have been within this state at the time of the service. But at least one of them was; hence we must hold that he was a proper person upon whom to make such service, and any difficulties that arise from the change of members or from the trouble of en-

forcing any proper judgment that may be obtained after hearing, are incidents of the defendant's voluntary action in the conduct of its business, and presumably must have been contemplated by it."

In referring to this case in the *St. Paul Typothetae* case the court said: "The associations there before the court were engaged in the business of insuring their members, a distinct and well-established line of business."

Coming to the character of the defendant organization as determined by its constitution and by-laws, we find that its activities embrace many having no necessary connection with its activities as a union and quite apart from "the promotion of the interests and welfare of their members, unaccompanied by any business functions." The constitution provides for dues. It provides for a union printers' home. It provides for an old age pension fund. It provides for death benefits. It provides for admission to the printers' home in proper cases. The home is in the name of a distinct corporation. The defendant functions not only as a labor union, having the welfare of its members as trade unionists in view, but as an organization which, through dues coming from its members, gives old age pensions, death benefits and a home for eligible infirm and invalid members. The trial court was of the opinion that the case came within the *Typothetae* case and that jurisdiction was not acquired. We are compelled to the conclusion that it comes more nearly within the *Order of Railway Conductors'* case, and that jurisdiction of the defendant for the particular cause of action alleged was acquired. We decide no other question than that of jurisdiction.

Whether the plaintiff can get anywhere with his case does not interest us, or whether his judgment, if he gets one, will be of use. It will be noted that in the *Typothetae* case the question whether the defendant bookbinders' union was an organization liable as an entity was determined at the trial, with no previous attack on the court's jurisdiction, and the statute quoted was considered in its bearing on the substantive right of recovery.

Order reversed.

**SALVATORE DI VITA AND OTHERS v. JOHN BARTON PAYNE,
DIRECTOR GENERAL OF RAILROADS, ETC.¹**

July 8, 1921.

No. 22,341.

Appeal and error — admissibility of record entries — discretion of trial court.

1. Whether record entries relative to the issues made in the regular course of business are properly verified as a basis for receiving them in evidence, is a question for the exercise of practical sense and sound discretion by the trial judge, and his decision will not be disturbed on appeal if there is any evidence reasonably supporting it.

Railway — duty to provide suitable cars for class of shipment.

2. It is the duty of a railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped, and it is not relieved from such duty by reason of the fact that the consignor inspected the car before loading.

Damage to shipment in transit — recovery from initial carrier.

3. Proof of the delivery of a shipment by consignor to the carrier in good condition and of its delivery to the consignee at the end of the route in damaged condition, is sufficient to sustain a recovery for damages against the initial carrier.

Liability of carrier for safe transportation of shipment.

4. A common carrier is an insurer of the safe transportation of goods committed to it for that purpose, and responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes.

Exemption of liability must come from certain excepted causes.

5. To relieve itself from such liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it nothing to show that the shipper was negligent if the damage would not have resulted except for the concurring fault of the carrier.

¹Reported in 184 N. W. 184.

Action in the district court for Hennepin county to recover \$1,066.85 damages to a carload of flour while in transit. The case was tried before Molyneaux, J., who made findings and ordered judgment in favor of plaintiffs for \$1,176.63. Defendant's motion for additional findings was granted and his motion to amend the findings was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

Stringer & Seymour, for appellant.

George C. Stiles and F. M. Miner, for respondent.

QUINN, J.

This action was brought against the Chicago, Rock Island & Pacific Railway Company to recover for damages to a carload of flour while in transit from Minneapolis to Niagara Falls. Subsequently John Barton Payne, director general of railroads, was substituted as defendant, and all the carriers referred to were operated by him. The Minneapolis Eastern Railway Company is a belt line in Minneapolis upon which the Pillsbury mills are located. Practically speaking, it is a terminal switching system in the milling district of Minneapolis. The Pillsbury Flour Mills Company was engaged in shipping both flour and feed and kept standing orders with the railroads for cars for both commodities. The plaintiff resides and is engaged in business at Niagara Falls in the state of New York. The Chicago, Rock Island & Pacific Railway Company has a line of road from Minneapolis to Chicago, where it connects with the Erie line which extends easterly through Niagara Falls. It was over these roads that the car of flour in question was transported from Minneapolis to Niagara Falls and there delivered to the plaintiff. As we gather from the record, the person referred to as the "car inspector of the Minnesota Transfer Railroad" was employed by and acted as the agent of all the carrier lines entering the Twin Cities.

The plaintiffs had purchased a carload of flour from the Pillsbury company, to be shipped to them at Niagara Falls. On November 1, 1918, an empty NYC box car was standing on the Minneapolis Eastern tracks near the mills, when a car inspector of the Minnesota Transfer Company inspected the same as to its suitability for the shipment of flour. He found and reported that the car had a leaky roof and made the

following notation on the side of the car with white chalk: "Leaky roof; no good for flour, O. K. for feed." This was the method of designating the condition of cars. On the following day the car was placed on the Pillsbury company track for loading. An employe of that company made an inspection of the car and reported it in good condition. On November 4 the Pillsbury company loaded the car with flour, made out a bill of lading in the standard form and delivered it to the joint agent of the railroads in Minneapolis for execution. The bill of lading was issued, and, together with the car of flour, delivered to the Chicago, Rock Island & Pacific Railway Company, for transportation to the plaintiffs at Niagara Falls. The contents of the car were damaged in transit by rain leaking through the roof. The cause was tried to the court without a jury, findings made and judgment ordered in favor of plaintiffs. Appellant moved for amended findings and for a new trial. This appeal was taken from the judgment subsequently entered upon the findings and order as amended.

Two reasons are urged why the judgment should be reversed: First, that it was error to receive in evidence the record containing the report of the inspector of the Pillsbury company with reference to the condition of the car, because no proper foundation had been laid therefor; and, second, the general proposition that the findings, decision and judgment of the court below were not supported by the evidence and should have been made in defendant's favor.

Upon the trial defendant offered testimony tending to show that an inspection of the car in which the flour was shipped was made by the car inspector of the Minnesota Transfer Railroad and certain markings made thereon by him indicating that the roof was not in suitable condition for the shipment of flour, as bearing upon the shipper's knowledge of the condition of the car at the time of loading. This testimony was received over plaintiff's objection. To controvert the same respondent produced from the records of the Pillsbury company its car book in which was kept a record of all cars loaded and shipped. This record was made in the usual course of business and preserved by the company as evidence of the facts it purported to show. The book contained the written report of the Pillsbury company's inspector to the effect that on the day before the car was loaded it was in proper condition for the

shipment of flour. This inspector was not produced as a witness as he was not then in the employ of the company and his whereabouts was unknown. Under the rule announced in *Swedish-Am. Nat. Bank of Minneapolis v. Chicago, B. & Q. Ry. Co.* 96 Minn. 436, 105 N. W. 69, the record was admissible. See also 1 Dunnell, Minn. Dig. § 3346.

It is the duty of a railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped, and it is not relieved from such duty by reason of the fact that the shipper inspected and accepted the car before loading. It appears that the inspector of the transfer company, acting for appellant, inspected the car two days before it was loaded. He found the roof leaky, marked the car not suitable for flour, and so reported to his superiors. As soon as the car was loaded with flour, appellant accepted it and undertook to transport the same to its destination. When appellant received the bill of lading issued by the joint agent, it had full notice that the car, which the inspector had condemned two days before, was loaded with flour and offered for shipment. In accepting the same under such circumstances, it cannot be held that the carrier is not liable for damages to the shipment on account of the defective condition of the car. *Shea v. Chicago, R. I. & Pac. Ry. Co.* 66 Minn. 102, 68 N. W. 608; *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. 817.

The trial court found that the car was unsuitable for the shipment of flour; that it was furnished by defendant for the transportation of either flour or feed; that defendant caused the same to be inspected and caused to be written with white chalk upon the side of said car the words "Leaky roof; no good for flour, O. K. for feed;" that when the same was loaded said words appeared thereon; that this was the method and practice adopted by defendant in designating the condition of cars as to their suitability for shipping either flour or feed, of which the Pillsbury company was aware; that it was the practice of the Pillsbury company to cause to be inspected cars furnished it for shipment of flour or feed for the purpose of ascertaining their fitness for such use; that the car in question was inspected by its inspector on November 2; that said inspector determined and reported that the roof was in good condition and that the car was previously loaded with grain; that the Pillsbury company was unaware of the fact that said car had been so marked and

had no knowledge that its roof was in a leaky condition. Proof of the delivery of the shipment to the carrier in good condition and of its delivery at the end of the route in damaged condition, is sufficient to sustain a recovery for damages against the initial carrier.

The Carmack amendment to the Hepburn Act as enacted June 29, 1906 (U. S. Comp. St. § 8604a), provides, in effect, that any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company, from the liability thereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

The general rule is that a common carrier of goods is an insurer of the safe transportation of the goods committed to it for that purpose, and it is responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes. These causes are: The act of God, act of public enemy, the inherent quality or "proper vice" of the articles themselves, or some act or omission of the shipper or owner. The case under consideration does not come within the exceptions. To relieve itself from liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it nothing to show that the shipper was negligent, if the loss or damage would not have resulted except for the concurring fault of the carrier. *Northwestern M. & T. Co. v. Williams*, 128 Minn. 514, 151 N. W. 419, L.R.A. 1915D, 1079; *Duncan v. Great Northern Ry. Co.* 17 N. D. 610, 118 N. W. 826, 19 L.R.A. (N.S.) 952, and note. See also note L.R.A. 1915C, p. 1223. The damage was the direct result of the defective car. The loading was proper, and but for the leaky roof there would have been no damage from rain.

Appellant's car inspector testified that on November 1 the car was on the unloading track; that it had been formerly loaded with wheat;

that he inspected it carefully, found a leaky roof unfit for flour and so marked and reported it; that his attention was called to the leaky roof by water stains on the inside of the car. The Pillsbury company's inspector also inspected the car, but, as appears from his report contained in the record testimony offered, did not detect the leaky condition of the roof, and the trial court found that the Pillsbury company had no notice or knowledge either of the leaky roof or of the marking of the car by appellant's inspector.

The finding, in our opinion, is justified by the testimony. It was a question of fact to be determined from the evidence.

Affirmed.

STATE v. J. N. DEAN.¹

July 8, 1921.

No. 22,343.

Sunday law — business of photographer — police power.

The Sabbath day observance statute prohibits work on the Sabbath which intereferes with the repose and religious liberty of the community and is not work of necessity or charity, and it prohibits certain work, though it does not disturb the community, upon the ground that a periodic cessation from usual labor makes for the physical and intellectual and moral welfare of mankind. The basis of the latter prohibition is in the police power of the state exercised for the general good. Applying the statute, it is *held* that the business of a photographer is work within its meaning; that conditions are such that competition substantially induces all studios to be open if some are; that a numerous body are affected if studios are kept open, and thereby deprived of a day of rest or recreation or religious observance; that the prohibition of the statute applies to photographers taking pictures on Sunday and is a legitimate exercise of the police power, and the conviction of the defendant is sustained, though his work was not so conducted as to interfere with the repose and religious liberty of the community.

Defendant was tried before Montgomery, J., in the municipal court of Minneapolis and convicted of the offense of keeping his photograph

¹Reported in 184 N. W. 275.

studio open for public patronage on what is commonly called the Sabbath day. Defendant's motion for a new trial was denied. From the judgment of conviction, defendant appealed. Judgment and order affirmed.

Shearer, Byard & Trogner, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, *C. D. Gould*, City Attorney, and *Thomas B. Kilbride*, for respondent.

DIBELL, J.

The defendant was convicted in the municipal court of Minneapolis of keeping open his photographic studio and doing the work of taking pictures therein on the Sabbath day. He appeals from the judgment of conviction and the order denying a new trial.

The relevant provisions of the law are G. S. 1913, §§ 8752, 8753. Section 8752, which is somewhat by way of preamble, prohibits the doing of "certain acts in § 8753 specified, which are serious interruptions of the repose and religious liberty of the community, and the doing of any of said acts on that day shall constitute Sabbath breaking." Section 8753 provides that "hunting, shooting, fishing, playing, horse racing, gaming and other public sports, exercises, and shows; all noises disturbing the peace of the day; all trades, manufactures and mechanical employments, except works of necessity performed in an orderly manner so as not to interfere with the repose and religious liberty of the community; all public selling or offering for sale of property, and all other labor except works of necessity and charity are prohibited on the Sabbath day."

It is expressly provided that meals may be served by caterers, and prepared tobacco, fruits, confectionery, newspapers, drugs and medicines may be sold. The sale of uncooked meats, groceries, clothing or boots is not permitted. Works of necessity or charity are defined as including "whatever is needful during the day for good order, health or comfort of the community." Barbering is expressly excluded from the definition. Baseball playing, in an orderly manner, not interfering with the peace, repose and comfort of the community, is expressly permitted within certain hours of the afternoon.

The so-called preamble came into the statutes through the penal

code. It has been understood as evidencing a legislative policy not to require the strict cessation of all kinds of work, or to prohibit indulgence in recreation and amusements, when they do not interrupt the repose and religious liberty of the community. Thus in *State v. Chamberlain*, 112 Minn. 52, 127 N. W. 444, 30 L.R.A.(N.S.) 335, 21 Ann. Cas. 679, the words, "other public sports, exercises, and shows," were held, by reason of the preceding words with which they were associated, to refer to out-of-door amusements and not to prohibit moving picture shows conducted in an orderly manner. And in *Houck v. Ingles*, 126 Minn. 257, 148 N. W. 100, it was held that a contract for advertising space on the curtain of a theater conducted in an orderly fashion on Sundays was not invalid. So it was held in *Holden v. O'Brien*, 86 Minn. 297, 90 N. W. 531, that the casual execution and delivery of a promissory note on the Sabbath was not prohibited. And in *Ward v. Ward*, 75 Minn. 269, 77 N. W. 965, it was held that a private casual sale was not forbidden.

There is another aspect in which the Sabbath day observance statute is to be viewed. It is conceded that a periodic idle day, when people cease their usual activities and devote themselves to rest or recreation or amusement or association with their fellows, or give attention to what they deem religious duties or privileges, is best for the physical and moral and social welfare of the community. A statute which fixes a rest day with this thought in mind is enacted in the exercise of the police power. The foundation principle is well stated in *State v. Petit*, 74 Minn. 376, 77 N. W. 225, where the provision of the statute prohibiting barbering on the Sabbath was held valid. There Justice Mitchell said [p. 379]:

"The ground upon which such legislation is generally upheld is that it is a sanitary measure, and as such a legitimate exercise of the police power. It proceeds upon the theory, entertained by most of those who have investigated the subject, that the physical, intellectual and moral welfare of mankind requires a periodical day of rest from labor, and, as some particular day must be fixed, the one most naturally selected is that which is regarded as sacred by the greatest number of citizens, and which by custom is generally dedicated to religious worship, or rest and recreation, as this causes the least interference with business or existing customs."

And further on Justice Mitchell said:

"The object of the law is not so much to protect those who can rest at pleasure as to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Moreover, if the law was not obligatory upon all, and those who desired to do so were permitted to engage in their usual vocation on Sunday, others engaged in the same kind of labor or business might, against their wishes, be compelled, by the laws of competition in business, to do likewise."

The defendant's studio was on the third floor of a building in Minneapolis. On a Sunday two men, one of whom was the state's only witness, went to the studio, apparently in quest of evidence. They tried the entrance door. It was locked. The defendant came from a side door into the hall. Upon inquiry he said he would take their pictures, though the studio was not supposed to be open. There was a lady present. It does not clearly appear that she was there for a sitting. It seems just as likely that she was there to examine proofs of pictures taken before. The defendant took the pictures of the two men, giving them several exposures, received pay, and the finished photographs were delivered a few days later.

Whether the taking of the pictures was a trade, manufacture or mechanical employment within the statute need not be discussed. Clearly enough it was work within the statute. It was not menial work. It was skilled work or even artistic work or professional work, but it was work. It is entirely clear that it was not a work of necessity or charity within the definition of the statute.

The conviction cannot be sustained, if it was necessary to show that the work done by the defendant was of a character interfering with the repose and religious liberty of the community. The taking of the pictures did not disturb the community. The conviction is sustained upon the ground that the prohibition was imposed in the legitimate exercise of the police power. It is a matter of common knowledge that photographic studios in times past and in times quite recent have been open on the whole or a part of each Sunday. In cities of considerable size studios, counting all grades of them, are numerous, and require the attendance of a considerable number of persons. To most of the proprietors their closing is not important if only competitors close. Com-

petition tends to make each do as the others do. Some establishments catering to street patronage may suffer an actual loss if they are not open Sundays. A portion of the public may suffer some inconvenience. However, the suffering of either the public or proprietors is not great. It was within the province of the legislature to determine that it was best that none should do business on Sundays. The language of the statute indicates such purpose. Unless given that effect a considerable number of persons, whose presence is necessary to the conduct of the business, will have for themselves no Sunday or but a part of a Sunday for rest or recreation or amusement or religious observances. There are kinds of work, not interfering with the repose and religious freedom of the community, not done in such a way that the public is annoyed, and not of such a character as to be subject to regulation under the police power, with which the law does not interfere though done on the Sabbath. And there are occasional technical or even substantial infractions of the statute, which the good sense of a tolerant community chooses to let pass without serious notice.

We uphold the conviction of the defendant upon the theory that he is one of a class so numerous that the police power of the state, for the common good of others in a like situation, may prohibit his working on the Sabbath day, though he does his work without interfering with the repose and religious liberty of the community.

Judgment and order affirmed.

STATE v. HAMMERMILL PAPER COMPANY.¹

July 8, 1921.

No. 22,344.

Pulpwood consigned to Pennsylvania not taxable in Minnesota.

Pulpwood was loaded and shipped by rail from the northern forests of Minnesota during the winter season to ports within the state on the shore of Lake Superior where it was stored in the rail carrier's yards

¹Reported in 184 N. W. 182.

until navigation over the lakes opened in the spring, then shipped to its final destination, which was Erie, Pennsylvania, as shown by the shipping bill. *Held*, that the first movement was a part of an interstate journey, that the delay at the ports did not destroy the interstate feature and that the property did not acquire a situs at the ports for the purpose of taxation.

In the matter of personal property taxes levied against defendant corporation for the year 1918 in the city of Two Harbors and townsite of Knife River, Lake county, the company answered, praying that the taxes and penalties be set aside and defendant be released from all obligation therefor. The matter was heard before Fesler, J., who made the findings and conclusions mentioned in the fourth paragraph of the opinion. From an order denying its motion for a new trial, the state of Minnesota appealed. Affirmed.

Clifford L. Hilton, Attorney General, *Egbert S. Oakley*, Assistant Attorney General, and *B. F. Fowler*, County Attorney, for appellant.

Washburn, Bailey & Mitchell, for respondent.

QUINN, J.

Defendant is engaged in the manufacture of paper at Erie, Pennsylvania, from pulpwood purchased in different states and shipped by common carrier to its place of business. In October, 1916, it entered into a contract with the Curry & Whyte Company of Duluth, for the purchase of not less than 57,000 nor more than 63,000 cords of pulpwood, one-third thereof to be delivered at the ports of Two Harbors and Knife River on the north shore of Lake Superior, in Minnesota, between the opening of navigation on the lake and November 1 each year for three years. Measurement and acceptance to be made on board cars at vessel loading point between January and April 30. The wood, except about 285 cords which was hauled in on sleds, was cut and loaded on cars in the forests of Northern Minnesota and shipped by rail to the ports mentioned, at interstate freight rates, the billing showing its final destination to be Erie, Pennsylvania.

Upon arriving at Two Harbors or Knife River, at which points it was to be loaded onto boats, the wood was inspected and that which passed inspection was stored in the yards of the railroad over which it had been

shipped and a yardage storage charge made therefor. The wood so accepted remained in the yards until the opening of navigation in the spring, when it was loaded onto boats and transported to its final destination.

On May 1, 1918, there was in store in the yards at the ports named considerable more than 30,000 cords of such pulpwood belonging to respondent, upon which the local authorities assessed and levied a state tax of over \$7,000. The validity of that tax is the bone of contention in this lawsuit. The sole question is, was the property in question an article of interstate commerce on May 1, 1918? It is conceded that property in transit from state to state is exempt from state taxation. It has been so held in this state. *State v. Maxwell M. S. Co.* 142 Minn. 226, 171 N. W. 566.

The trial court found and held that, due to natural causes, it was not possible to transport said pulpwood from Two Harbors or Knife River by boat to Erie, Pennsylvania, until navigation opened in the spring of 1918, and as soon as the navigable season opened on the Great Lakes all of the wood assessed was transported by boat to Erie; that the boats were loaded from the docks of the respective railway companies, and during the whole of the time after the wood was loaded upon cars until the arrival of the same at Erie (except such wood as moved by sleds) was in the care and custody of the rail carriers or the lake carriers; that it was contemplated at the time the wood was loaded on cars for transportation that the same should ultimately be delivered at Erie, and that it was in fact so delivered, but, owing to the fact that it is not possible to operate boats on the Great Lakes by reason of natural causes during the winter season, a considerable part of said wood was in the yards of the respective railway companies at the ports in Minnesota on May 1, 1918, and that the same was in process of transportation by common carrier from the place where it was loaded in Minnesota until it arrived at Erie, and had no taxable situs in this state; that as conclusions of law the personal property tax assessed and levied against the defendant on account of such pulpwood is void and should be set aside, except the amount thereof levied against the defendant by reason of the wood hauled to said ports on sleds, and ordered judgment accordingly. From an order denying appellant's motion for a new trial this appeal was taken.

It is contended on behalf of appellant that the lake ports were used merely as assembling points, and that the purchase and acceptance of the wood on board cars at these points were only for convenience in inspecting and measuring and that storage was a preliminary to the interstate journey. That the assembling of the wood shipped by rail was not different from that brought in on sleds. That the acts necessary to render the commodity shipped an article of interstate commerce remained yet to be performed, namely, the procuring of boats and the loading of the wood for shipment to its destination. And, further, that the indefinite delay at the ports destroyed the interstate feature of the shipment, if any such had attached prior to its arrival at such ports.

The greater portion of the wood in question was cut and loaded on cars back in the woods by the sellers, and then transported by rail to the ports. Interstate rates were applied. These rates were justified by the decision in *Pulp & Paper Mnfrs. T. Assn. v. Chicago, M. & St. P. Ry. Co.* 34 L. C. C. R. 500, 510, where it is stated, "It appears that during the winter months shipments of pulpwood from points on petitioner's line destined to points on the Great Lakes are hauled to the docks at Knife River, there unloaded, and held until the opening of navigation in the spring. On such shipments petitioner has assessed the intrastate rates, which are higher than those prescribed by us, although it was known to petitioner when these shipments left the points of origin that they were destined to interstate points beyond Knife River. Petitioner seems to be in doubt as to whether or not the interstate rates should have been assessed, but justifies its action by asserting that this traffic was billed only to Knife River. Petitioner appears to fear the presentation of reparation claims because of its having assessed the intrastate rates. We entertain no doubt that such shipments are interstate and subject to the interstate rates."

As to the pulpwood involved in this action, the portion loaded on cars was so billed as to show its ultimate destination to be Erie, Pennsylvania. The trial court so found. The wood was stored with the rail carrier for shipment to Erie as soon as navigation over the lakes would permit. Under its contract \$7 per cord was to be paid by the respondent to the seller on or before the fifteenth of each month for all wood measured and accepted during the previous month, the balance of \$1.60 per

cord to be paid after the arrival of each cargo at Erie. All these matters were proper to be taken into consideration by the trial court in determining whether the wood was held in storage for the purpose of being forwarded to Erie as soon as the season would permit. That court passed upon this question and settled it adversely to appellant. *State v. Franklin Sugar-Refining Co.* 79 Minn. 127, 81 N. W. 752.

It is common knowledge that the removal of pulpwood from the northern swamps and forests is practically confined to the winter season when the ground is frozen, which necessitates the hauling, unloading and holding at the docks until the opening of navigation in the spring. It is suggested that such shipments might be made by rail, thereby avoiding all delay, but the shipment of pulpwood such a distance by rail would be wholly impracticable. The contract of purchase and sale clearly recognized this fact and contemplated shipment over the lakes. If the contract amounted to an actual sale and the wood was en route to fill the contract, it is of no importance whether the shipment by rail was made out in the name of the shipper or the buyer. The localities seeking to enforce the tax never had any proprietary interest in the wood. The wood was in the course of transportation to another state when the cars left the forest.

Affirmed.

IN THE MATTER OF THE APPEAL OF CONSOLIDATED
SCHOOL DISTRICT NO. 41, CROW WING COUNTY,
FROM AN ORDER OF THE COUNTY BOARD
OF SAID COUNTY.¹

July 8, 1921.

No. 22,354.

School and school district — changing boundary — right of appeal statutory.

The right of appeal from orders of county boards, changing the boundaries of school districts, is statutory. There is no right of appeal un-

¹Reported in 183 N. W. 979.

less given by statute. The statutes of this state do not give a right of appeal from an order made on a rehearing of a petition for change of boundaries of a school district under G. S. 1913, § 2703.

From an order of the county board of Crow Wing county reversing its order attaching certain territory of District No. 67 to Consolidated School District No. 41, the latter district appealed to the district court for that county. The appeal was heard by McClenahan, J., who made findings and dismissed the appeal. From an order denying its motion for a new trial, School District No. 41 appealed. Affirmed.

M. E. & C. A. Ryan, for appellant.

F. E. Ebner, for respondent.

HALLAM, J.

In June, 1919, the school board of Consolidated School District No. 41, of Crow Wing county, petitioned the county board to make part of such district certain lands included in district No. 67. The county board made an order granting the petition. In the following April, a petition was filed with the county board for a rehearing of the order of June, 1919. Upon such rehearing the county board reversed its former order and ordered that the territory attached be again detached. Notice of appeal to the district court was served, the notice being signed "Consolidated School District No. 41 by F. G. Schrader, its chairman." On the hearing of the appeal the court held that there was no right of appeal from the order made on rehearing; that if wrong on that point, that a school district had no right of appeal, and if wrong on that point, that the appeal was not authorized by the school district and hence was inoperative. The court accordingly dismissed the appeal. District No. 41 thereupon appealed to this court.

It is manifest that, if the first ruling was correct, this disposes of the case. We are of the opinion that this ruling was correct.

The rehearing was had under G. S. 1913, § 2703, which reads as follows: "When the boundaries of any district have been changed by order of the county board, if there shall be filed with the auditor a petition to such board for rehearing, signed by not less than five freeholders, legal voters in said district, the auditor shall present the same to the

board at its next meeting. The board shall thereupon set a time and place for rehearing, and shall cause notice thereof to be served on the clerks of the districts affected by such change, and posted as in case of the original petition. The hearing may be adjourned from time to time, and the board shall make such order in the premises as it shall deem just."

There is no provision in this section for an appeal from the order made on rehearing. Nor is there anywhere in the statutes any provision for appeal from orders made on rehearing in any case except in G. S. 1913, § 2704, as amended by chapter 113, p. 146, Laws of 1915, which reads as follows: "When any freeholder shall present to the board of any county a petition, verified by him, stating that he owns land in such county adjoining any district therein, or separated therefrom by not more than one-quarter section, and that such intervening land is vacant and unoccupied, or that its owner is unknown, and that he desires his said land, together with such intervening land, set off to such adjoining district, and his reasons for asking such change, the board, upon notice and hearing as in other cases, and upon proof of all the allegations of the petition, may make its order granting the same, and like notice of such change shall be given as in other cases; provided, that any person or officer of any school district aggrieved by any order of the county board made pursuant to the provisions of this section, or by any order of the county board, made on the rehearing before it of any such petition, may appeal to the district court from such order, such appeal to be governed by the provisions of section 2676, General Statutes, 1913."

This gives an appeal from orders made on rehearing only in the class of cases covered by section 2704. The case at bar did not arise under section 2704. There is no right of appeal in such cases unless given by statute. The statute is clear in its language. Whatever may have been the reason, the legislature has not given the right of appeal from an order made on a rehearing under section 2703.

ROYCE G. HOMAN v. ARTHUR E. BARBER.¹

July 8, 1921.

No. 22,876.

Broker — action for commission — judgment upon pleadings.

The complaint alleged that the plaintiff secured a purchaser for the defendant's land at a fixed sale price and thereby earned an agreed commission of one dollar per acre. The defendant claimed that the sale price fixed was net to him and that the plaintiff was to have as his commission all in excess; that the plaintiff sent a purchaser to whom he sold at the price fixed; that the purchaser would give no more, but that he induced the purchaser to promise to pay the plaintiff a commission of one dollar per acre. On a motion for judgment on the pleadings they are to be construed favorably to the party against whom judgment is asked, and it is *held* that it was error to order judgment on the pleadings in favor of the plaintiff.

Action in the district court for Yellow Medicine county to recover \$400 commission on a sale of land. Plaintiff's motion for judgment on the pleadings was granted, Daly, J. From the judgment entered in favor of plaintiff, defendant appealed. Reversed.

Bert O. Loe, for appellant.

C. A. Fosnes, for respondent.

DIBELL, J.

The defendant appeals from a judgment for the plaintiff on the pleadings.

The action is to recover a commission on the sale of 400 acres of land owned by the defendant. The complaint alleges that on May 10, 1919, the plaintiff and the defendant entered into an agreement whereby the plaintiff, if he procured a purchaser for the land at \$150 per acre, was to have a commission of one dollar per acre; that on the eighth day of June he procured a purchaser, and that the defendant on June 9 sold the land to the purchaser for \$150 per acre on acceptable terms.

¹Reported in 184 N. W. 19.

The answer, in addition to the general denial, alleges that prior to June 9, 1919, defendant listed his land with the plaintiff at \$150 per acre net to him; that about the date stated the plaintiff notified him that he had sent a prospective purchaser and asked him to protect him in a commission of one dollar per acre, if the sale were effected; that he promised that he would try to do so; that the prospective purchaser offered \$150 per acre and refused to pay more; that to protect the plaintiff in a commission the defendant agreed with the purchaser that he, the purchaser, would pay the plaintiff a commission of one dollar per acre; that he was unable to effect a sale at a price in excess of \$150 per acre, except on the terms stated, and that he sold at that price. The reply was a general denial.

The plaintiff's motion for judgment was not granted upon the theory that he was entitled to one dollar per acre commission, if he procured a purchaser at \$150 per acre. While this was his claim of what the contract was, the answer put his claim in issue. It was granted upon the ground that the defendant's answer showed a right of recovery in the plaintiff.

The case of *Holcomb v. Stafford*, 102 Minn. 233, 113 N. W. 449, is of value. There the owner agreed that the broker should have all that he could obtain for a piece of property in excess of \$500. He procured a purchaser at \$500, and the owner sold to him for that amount. The court said: "Under the terms of his agreement plaintiff could claim a commission only in the event he procured a purchaser for the property at a price in excess of \$500; the excess being the measure of his commission. If he procured no purchaser ready, able and willing to pay more than that amount, he earned nothing, and the court correctly awarded judgment against him." And the court said further: "Here the broker was entitled to the excess over and above the net price to the owner, and he was not entitled to a commission, except on procuring a purchaser ready, able and willing to pay more than that price. Defendant was under no obligation to make an effort to induce the purchaser to pay more than the price given plaintiff."

The defendant says that the listing was \$150 net; that he promised the plaintiff, when informed that he had sent a prospective purchaser, to

try to protect him in a commission of one dollar per acre; that he did try to do so; that the prospective purchaser would give no more, and that he closed at a price of \$150, getting from the purchaser, however, a promise to take care of the plaintiff to the extent of one dollar per acre. That was the result of his effort to protect the plaintiff in a commission.

It may appear, when the evidence comes in, that the contract was to pay one dollar commission if a purchaser was procured at \$150 per acre. If so, the plaintiff is entitled to his commission. It may be that the defendant sought to relieve himself of the burden of his contract with the plaintiff by exacting from the purchaser a promise to pay the commission. Of course he could not shift the burden so. Or on a trial it may be shown that the sale was really at a net price of \$150 per acre and the arrangement whereby the purchaser was to pay one dollar per acre was but a subterfuge. We do not know what the evidence may show.

In determining whether the motion was rightfully granted, we have in mind the rule that the pleadings must be construed favorably to the party against whom the judgment is asked. 2 Dunnell, Minn. Dig. and 1916 Supp. §§ 7689-7694. The answer is not a model one, but the pleadings do not show that the plaintiff has an undisputed right of recovery.

Judgment reversed.

ANDREW STOCKHAUS v. ELLIS A. LIND, ALSO KNOWN AS
ELLIS CARLSON.¹

July 8, 1921.

No. 22,380.

Alienation of affections — writ of attachment.

1. A writ of attachment may issue in an action for alienation of affections.

Motion to dissolve writ — conflicting affidavits — finding of fraud sustained.

2. On an appeal from an order denying a motion to dissolve a writ of

¹Reported in 183 N. W. 844.

attachment upon the ground of a fraudulent transfer of property, where the affidavits are conflicting, the determination of the trial court will not be disturbed if there is evidence fairly supporting it. In this case the evidence sustains the finding of fraud necessarily included in a general order refusing to dissolve the writ.

Action in the district court for St. Louis county to recover \$15,000 for alienation of wife's affection. The answer was a general denial. From orders, Magney, J., denying his motions to set aside the attachment and for a rehearing of motion, defendant appealed. Affirmed.

Charles Line, for appellant.

Andrew Nelson and John Cedergren, for respondent.

DIBELL, J.

The defendant appeals from an order denying his motion to dissolve a writ of attachment.

1. The statute is as follows: "In an action for the recovery of money, other than for libel, slander, seduction, breach of promise of marriage, false imprisonment, malicious prosecution, or assault and battery, the plaintiff, at the time of issuing the summons or at any time thereafter, may have the property of the defendant attached in the manner hereinafter prescribed as security for the satisfaction of such judgment as he may recover."²

The action was brought by the plaintiff for the alienation of the affections of his wife. Among other allegations appropriate to the character of the action is the charge that the defendant debauched her. Counsel for the defendant forcefully urges that the action is within the statute excepting an action for seduction from those in which an attachment may issue. We have given the defendant's contention careful consideration and have reached the conclusion that it should not be upheld. The complaint easily identifies the cause of action alleged as an ordinary one for alienation of affections. The plaintiff may recover without proving that the defendant debauched his wife. The legislature might well enough have included an action for the alienation of affections with those excepted from the attachment statute. It did not and it is not for us to put it in.

²[G. S. 1913, § 7845.]

2. The question whether the defendant fraudulently transferred his property is presented on conflicting affidavits. There was some evidence that he transferred some of his property with the plaintiff's claim in view. The question is a close one. The decision of the trial court upon the disputed facts has its usual significance. *Ekberg v. Swedish-Am. Pub. Co.* 114 Minn. 519, 130 N. W. 1032; *Viers v. Perry*, 112 Minn. 348, 127 N. W. 1120; *Schoeneman v. Sowle*, 102 Minn. 466, 113 N. W. 1016. The order refusing to dissolve the writ necessarily includes a finding of fraud and it is sustained by the affidavits. There is nothing in the motion for a rehearing calling for discussion.

Order affirmed.

A. L. PRATSCHNER, AS ADMINISTRATOR OF THE ESTATE
OF ELIZABETH PRATSCHNER, DECEASED v. ELECTRIC
SHORT LINE RAILWAY COMPANY.¹

July 8, 1921.

No. 22,381.

Railway — accident at crossing — evidence not prejudicial.

1. Testimony received over objections, bearing directly upon the proper method of operating an automobile over a crossing, *held* not reversible error, it not being prejudicial to the rights of the appellant.

Charge to jury — assignments of error.

2. Assignments of error as to isolated parts of the charge not well taken, the general charge being such as to fully and fairly submit all the issues to the jury.

Action transferred to the district court for McLeod county to recover \$7,500 for the death of plaintiff's intestate. The case was tried before Tift, J., who at the close of the testimony denied defendant's motion for a directed verdict on the ground that the testimony failed to show that the accident was due in any way to the negligence of the defendant, and a

¹Reported in 184 N. W. 188.

jury which returned a verdict for \$3,000. From an order denying its motion for a new trial, defendant appealed. Affirmed.

George T. Simpson, John F. Dahl, and G. W. Brown, for appellant.

Samuel A. Anderson, Murray & Baker and L. D. Barnard, for respondent.

QUINN, J.

This is an appeal from an order of the district court of McLeod county refusing a new trial. The action was brought to recover for the wrongful death of Elizabeth Pratschner, plaintiff's intestate, for the exclusive benefit of the next of kin of the deceased.

It is alleged in the amended complaint that defendant's line of railway near the village of Winsted intersected at right angles a north and south public highway; that on the nineteenth day of September, 1918, and for a considerable time immediately prior thereto, defendant kept and maintained its right of way at said highway crossing in a careless and negligent manner in this, that there was an abrupt drop of several inches from the planking of said crossing to the dirt grade on each side of the said main track and on each side of said side track; that while deceased was riding as a passenger in an automobile traveling in a southerly direction on said highway and crossing said railroad track, and while in the exercise of due care and without any negligence on her part, the defendant, well knowing the defective condition of said highway crossing, carelessly, negligently and without regard to the safety of travelers thereon, and without giving a sufficient signal, or keeping a proper lookout ahead, and without having a flagman stationed at said crossing to warn persons of the approach of cars, ran and propelled a certain electric passenger car at a high and dangerous rate of speed in an easterly direction over said highway, striking with great force the automobile in which decedent was riding, thereby throwing her from said automobile and causing her instant death. The answer denies negligence on the part of defendant and alleges that the decedent's death was the result of her own negligence. In appellant's brief are set forth 13 assignments of error, the first six of which go to the ruling of the court upon the admissibility of evidence. The other assignments relate to alleged errors in charging the jury.

The testimony discloses that there is a main line track and a side track about 10 feet apart at this crossing. There were planks between the rails of both tracks and a plank six inches wide and three inches thick on the outside of the four rails, all flush with the rails, but the plank north of the north side track rail and the one north of the north main track rail stood above the roadbed about two inches. The space between the two tracks sagged down a few inches. Deceased was coming from the north in a Ford coupe driven by her son. He also was killed in the collision. The electric car was approaching from the west. The weather was cold and there was a strong wind from the northwest. There is testimony tending to show that a Ford automobile, passing over this crossing at the rate of 10 to 12 miles per hour, would receive severe bumps, and that it would be compelled to slow down to about six miles per hour having in mind the safety of the car and passengers. At a point about 60 feet west of the highway was a large number of piles of ties ranging in height up to nine or ten tiers, tending to obstruct the view of a car approaching from that direction. There was also testimony tending to show that the whistle on this car was not easily heard, and that it was blown only at whistling posts. The automobile was struck broadside and was carried on the pilot of the electric car, dragging upon and somewhat splintering the ties for a distance of over 500 feet. The motorman testified that he was running the car about 18 to 20 miles per hour; that he applied the air brakes when he heard the crash; that he could not stop because there was oil on the rails; that the car had a speed of 50 miles per hour; that the brakes were in good order and that running 20 miles per hour on dry rails he could stop the car in 125 feet. The coupé was entirely inclosed, with glass doors and a glass shield. The sun was shining brightly in the west. There were three passengers on the electric car, all of whom testified that they observed the automobile through the windows, when it was some 800 feet north of the crossing.

The testimony received over appellant's objections bore directly upon the proper method of operating a Ford car over the crossing in its condition prior to the accident. The testimony was given by a witness accustomed to driving a Ford car over the crossing, and, while it was not elicited in the most formal manner, yet we see no prejudice to the rights of the defendant flowing therefrom. There was no prejudicial error in

the rulings. Seven assignments are urged to the charge. They are to isolated parts thereof. A reading of the entire charge as given, discloses that the issues were fully and fairly submitted to the jury and that there was no error on the part of the trial court in refusing a new trial. The court informed the jury as to the requirements of the statute with reference to such crossings and fairly submitted to it whether the crossing was in proper condition.

Affirmed.

EMMA HARRIS v. J. H. KAUL.¹

July 8, 1921.

No. 22,413.

Workmen's Compensation Act — injury to teamster not in course of his employment.

1. A teamster who, in a fit of anger, beats one of the horses he is employed to care for and drive, his anger being provoked by a cause wholly foreign to the employment, is not entitled to compensation under the Workmen's Compensation Act, if injured by a kick from the horse when he is so beating it.

Judge's memorandum not equivalent to specific finding.

2. Neither the evidence nor the findings show that, when he was kicked, the workman was in the act of cleaning the horse. A statement that he was, found only in the trial judge's memorandum, is not the equivalent of a specific finding that such was the fact.

Upon the relation of Emma Harris the supreme court granted its writ of certiorari directed to the district court for Rice county and the Honorable Arthur B. Childress, judge thereof, to review proceedings in that court brought under the Workmen's Compensation Act by relator, widow of Fred Harris, employe, against J. H. Kaul, employer. Affirmed.

Lucius Smith and Moonan & Moonan, for relator.

James P. McMahon and George S. Grimes, for respondent.

¹Reported in 183 N. W. 828.

LEES, C.

This is a proceeding under the Workmen's Compensation Act, brought by the widow of Fred Harris, a teamster who was fatally injured by a kick from one of his employer's horses. The findings of the district court were that on the morning of May 4, 1920, Harris went to his employer's barn to care for, clean and harness the team he drove. He owned and used a blacksnake whip. One of the team, a mare named Maud, was quietly standing in her stall and feeding. Harris, without provocation or excuse, maliciously and violently beat her with the whip, standing near her hind feet as he did so. The mare became frightened and frenzied with pain as a result of the whipping and kicked Harris in the abdomen, so injuring him that he died on the following day. The mare was gentle, though a nervous animal, and had never kicked anyone before. Harris' injury did not arise out of and in the course of his employment. The conclusion was that the proceeding should be dismissed. Judgment was entered on the findings and Mrs. Harris sued out a writ of certiorari, bringing the record here for review.

Counsel for relator are correct in stating that the only question presented is whether Harris' death was caused by an injury which arose out of and in the course of his employment. There is an allegation of wilful negligence in the answer, but we have disregarded it, assuming, for the purposes of this decision, that relator is right in asserting that under our statute wilful negligence is not a defense. We note relator's emphatic assertion that Harris was actually engaged in cleaning the mare when she kicked him. We have been unable, however, to find in the record a concession by respondent, or either conclusive proof or a finding that he was in fact so engaged at the time of the injury.

Joseph Roehick was the only eyewitness of the accident. He testified for respondent. In substance this is what he related: He went to respondent's barn at 6 in the morning and fed the horses. There were three teams. Harris was the driver of one of them. It was his duty to clean and harness his team. He owned a blacksnake whip and kept it at the barn. He used it in driving his team. When he entered the barn, he took a brush and curry-comb in one hand and the whip in the other and began to beat the mare with the whip. He beat her for about a minute. She was feeding in her stall when he began to do so and

crowded forward when she was struck. The witness told Harris to stop and he threw the whip on the floor behind the mare, and at that instant she kicked him. Surely this testimony falls short of showing conclusively that Harris was actually engaged in cleaning the mare when he was kicked. In a memorandum, the trial judge said: "It appears that he (deceased) was in the act of cleaning the horse 'Maud', but I don't think under the facts in this case, that it was any part of his duties to whip the horse in the manner in which he did, and, therefore, that his injuries did not arise out of his employment." This statement, not made or included in the findings, is not the equivalent of a specific finding that when injured Harris was in the act of cleaning the mare. *Fletcher v. Southern C. Co.* 148 Minn. 143, 181 N. W. 205.

On reverting to the ultimate question in the case relator encounters the specific finding that Harris' injury did not arise out of and in the course of his employment. This finding must be sustained under the rule formulated by the Chief Justice in *State ex rel. Niessen v. District Court of Ramsey County*, 142 Minn. 335, 172 N. W. 133, and applied in many subsequent cases. *State ex rel. Green v. District Court of Ramsey County*, 145 Minn. 96, 176 N. W. 155; *State ex rel. Berquist v. District Court of Beltrami County*, 145 Minn. 127, 176 N. W. 165; *State ex rel. Johnson v. District Court of Carver County*, 145 Minn. 444, 177 N. W. 644; *State ex rel. Kile v. District Court of Hennepin County*, 146 Minn. 59, 177 N. W. 934; *State ex rel. Taylor v. District Court of Ramsey County*, 147 Minn. 10, 179 N. W. 217; *Kraker v. Nett*, 148 Minn. 139, 180 N. W. 1014.

Beyond referring to what has been said in *State ex rel. Duluth B. & M. Co. v. District Court of St. Louis County*, 129 Minn. 176, 151 N. W. 912; *State ex rel. Johnson v. District Court, Hennepin County*, 140 Minn. 75, 167 N. W. 283, L.R.A. 1918E, 502, and *Hinchuk v. Swift & Co.* 149 Minn. 1, 182 N. W. 622, we do not attempt to define the phrase "accident arising out of and in the course of employment." It has not heretofore seemed wise to formulate an all-inclusive definition. *State ex rel. Peoples C. & I. Co. v. District Court of Ramsey County*, 129 Minn. 502, 153 N. W. 119, L.R.A. 1916A, 344. It is doubtful whether anything can be said that would help to make clearer the meaning of the language used in the statute. The phrase occurs not only in our own act

but in the English act and the acts of many of the states as well. It has been said of it, that it admits of an inexhaustible variety of application according to the nature of the employment and the character of the facts proved. We are mindful of the rule that the act is to be liberally construed in favor of workmen. Nevertheless, we see no escape from the conclusion that the vital finding against relator cannot be disturbed. Roehick testified that Harris was angry when he came to the barn, saying his wife had stayed out late and had not prepared his breakfast for him and then immediately began to beat the mare. Surely a workman is not serving his employer in beating a horse he is hired to care for and drive, if the only reason for his doing so is to give vent to his wrath. If the animal had provoked him while he was caring for or driving it and he had whipped it, the situation would be quite different.

It is true that Harris was injured when he was on his employer's premises, where his services required his presence and during his hours of service, but these facts alone do not entitle relator to compensation. A workman, injured at a time when he is at liberty from the service and pursuing his own ends exclusively, or when, after beginning work, he has stepped aside from his employment to do an act in no way connected therewith, is outside of the employment, for the reason that the relation of master and servant is for the time suspended. *Morier v. St. Paul, M. & M. Ry. Co.* 31 Minn. 351, 17 N. W. 952, 47 Am. Rep. 793. If Harris had come to the barn in an ill humor, and, to relieve his pent-up anger, had attacked Roehick, who, in defending himself, had struck and injured his assailant, it could not be contended with any show of reason that compensation should be awarded. We see no difference between the case supposed and the case actually presented. Dumb beasts, as well as men, will use their natural means of defense when violently attacked, no way of escape being open to them.

We have not overlooked the many cases cited by relator as apposite, in which it was held that a workman injured in an altercation with a fellow workman or a stranger was entitled to compensation. We find that in all such cases the altercation was in some way connected with the employer's work or came to pass while the employe was serving the employer's interest. *Clark v. Clark*, 189 Mich. 652, 155 N. W. 507, illustrates the distinction between the cases relied on and the case at bar.

A number of the cases cited were analyzed by Justice Hallam in *Hinchuk v. Swift & Co. supra*, followed by a concise statement of the principle derived from them, namely, a causal relation between the employment and the injury must exist to bring a case within the statute. We think there is a distinction between doing recklessly and maliciously the thing a workman is employed to do and doing the same thing outside and disconnected from his employment. If an accident happens in the first instance, the workman may be entitled to compensation, but not in the last instance.

The judgment is affirmed.

STATE v. MALCOLM MOREHART.¹

July 8, 1921.

No. 22,489.

Criminal law — payment of state's disbursements by defendant.

1. In passing sentence upon a man convicted of the crime of attempting to have carnal knowledge of a female under the age of 18 years, the district court may require the payment of such items of the state's disbursements as would be properly taxable against the defeated party in a civil action, in addition to the penalty imposed as punishment for the crime.

Such disbursements to be taxed before sentence.

2. Such disbursements must be properly ascertained and taxed before their payment can be adjudged as part of the sentence pronounced by the court.

Defendant was indicted by the grand jury of Blue Earth county charged with the crime of carnally knowing and abusing a female child under the age of 18 years, plead guilty to the crime of attempting to commit the crime charged and on motion of the county attorney adjudged guilty and sentenced by Comstock, J. From the judgment of the court, defendant appealed. Modified and case remanded.

¹Reported in 183 N. W. 960.

C. J. Laurisch, for appellant.

Clifford L. Hilton, Attorney General, *James E. Markham*, Assistant Attorney General, and *Charles E. Phillips*, County Attorney, for respondent.

LEES, C.

Defendant applied for and was given leave to enter a plea of guilty of the crime of attempting to have carnal knowledge of a girl 16 years old. The court sentenced him to confinement in the county jail of Blue Earth county for the term of four months "and further and in addition thereto * * * to pay the costs taxed by the state in the sum of two hundred ninety-nine dollars and that [he] be confined in the county jail * * * until such costs be paid, not exceeding the term of six months in all." Defendant appealed from the judgment. He contends: (1) That the court had no power to require the payment of the costs; (2) that, if it had, there has been no taxation of them.

1. In support of the first contention, it is argued that, if defendant had in fact had carnal knowledge of the girl, the only punishment which could be inflicted was imprisonment in the state prison or county jail, section 8656, G. S. 1913; that the punishment prescribed by section 8490, G. S. 1913, for an attempt to commit the crime, is imprisonment for not more than half of the longest term fixed by section 8656, and that the provisions for a fine found in section 8490 can have no application to a crime punishable by imprisonment only, and, finally, that the court had no power to require the payment of costs, because they would be the equivalent of a fine. We think defendant's position cannot be successfully maintained. Section 7988, G. S. 1913, provides that in all criminal actions, upon a conviction, the court may adjudge that defendant pay the whole or part of the disbursements of the prosecution in addition to the penalty prescribed. There is nothing in the language of that section limiting its application to offenses which may be punished by a fine. Moreover, the payment of the state's disbursements is not part of the penalty, but something in addition thereto. The evident purpose of the statute is not the punishment of the offender, but the reimbursement of the state. It should be held, however, to refer to such items of disbursements as are properly taxable against a defeated party,

and not to include those items of expenses connected with the trial which cannot be taxed as disbursements. Board of Co. Commrs. of Hennepin County v. Board of Co. Commrs. of Wright County, 84 Minn. 267, 87 N. W. 846. We, therefore, hold that the district court had power to require the payment of the state's disbursements incurred in the prosecution of the defendant.

2. The judgment refers to the amount defendant was required to pay as "the costs taxed by the state." If we can look no farther than this statement in the judgment, it would appear, presumptively at least, that the costs had been properly ascertained and taxed. State v. McKinley, 114 Minn. 434, 131 N. W. 369. It is difficult to understand how so large an amount could be expended by the state for items of disbursements properly taxable. We learn from the state's brief that 13 men, in addition to defendant, were indicted, charged with having had carnal knowledge of the girl during a period of four months. After two had been tried, the regular panel of petit jurors was excused, a special venire issued and two more cases tried when the jurymen were again excused and a second special venire issued. The trial of two more cases was followed by the discharge of the jurymen, and the issuance of a third special venire, to which defendant filed objections. Thereupon the regular panel was recalled, and when the present case was reached for trial defendant asked leave to plead guilty to a charge of attempted carnal knowledge, with the result already stated. We infer that the bill of disbursements is largely made up of officers' fees for summoning jurors and the fees of the jurors themselves. If such is the fact, we have no hesitation in saying that such fees were not taxable against defendant. It has been the policy of the state to treat the expenses of criminal trials as county burdens, Mathews v. Board of Co. Commrs. of Lincoln County, 90 Minn. 348, 352, 97 N. W. 101, and it has been held that, where there are several defendants, the taxable costs may not be charged wholly against one of them at the discretion of the taxing officer. Steenerson v. Board of Co. Commrs. of Polk County, 68 Minn. 509, 71 N. W. 687.

It is our duty, in a criminal case, to examine the record and render judgment upon it. Section 9247, G. S. 1913; State v. Hjerpe, 109 Minn. 270, 272, 123 N. W. 474. An examination of the record and files in the district court as returned here discloses that there was neither a

formal taxation of costs nor any ascertainment of the state's disbursements, and hence there is no foundation for that portion of the judgment which required defendant to pay the costs. The judgment should be modified by striking out so much thereof as requires the payment of \$299 costs and defendant's confinement in the county jail until the same is paid. The state should be permitted, however, to have its disbursements properly ascertained and taxed and payment thereof enforced as provided by section 7988, G. S. 1913. The disbursements so taxed should include only items of the same character as might be taxed in a civil action under the provisions of section 7976, G. S. 1913.

Judgment modified and the case remanded for further proceedings in accordance herewith.

STATE EX REL. RUTH PLATZER v. R. W. BEARDSLEY
AND ANOTHER.¹

July 11, 1921.

No. 22,498.

Adoption of bastard — revocation of mother's consent.

1. An illegitimate child cannot be adopted without the consent of the mother. Her consent, though given in writing and accompanied by a transfer of the custody of the child, may be revoked at any time before the child is legally adopted.

Habeas corpus — new trial in supreme court — stipulation of parties.

2. On appeal from the judgment of the district court in a habeas corpus proceeding to determine the custody of a child, there is a trial of the issue de novo, although the parties stipulated that the cause should be heard and decided solely upon the record in the district court, and this court will ascertain as best it may from the return to the writ, which was not traversed, what is for the best interests of the child.

Care of infant child — presumption in favor of mother.

3. The presumption that a mother is a fit and suitable person to be entrusted with the care of her infant child was not overcome by the uncontroverted allegations of the return.

¹Reported in 183 N. W. 956.

Upon the relation of Ruth Platzer the district court for Hennepin county granted its writ of habeas corpus directed to R. W. Beardsley and Sadie Beardsley for the possession of relator's infant child. The court, Jelley, J., made findings and ordered that the child be returned to her mother. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

William T. Coe, for appellants.

Edwin C. Garrigues, for respondent.

LEES, C.

Respondent is the mother of a female child born out of wedlock on February 20, 1921. On April 30 she signed an agreement consenting to its adoption by the appellants, and on May 18 the child was placed in their custody. On May 23 they filed in the district court of Hennepin county a petition for leave to adopt the child. It came on for hearing on that day. The respondent appeared in person and in open court stated that she withdrew and revoked her consent to such adoption, whereupon the court declined to go on with the proceeding. On the same day she applied to the district court for a writ of habeas corpus to regain possession of her child. Her petition alleged that the child had been given into the custody of appellants by a third person without the consent of the petitioner and that she had revoked her consent to its adoption. The return to the writ was that appellants held the custody of the child by virtue of the agreement of April 30, which was set out at length. The agreement recited that respondent was destitute and unable to provide suitable care and nourishment for her child. The return also alleged that appellants had performed their part of the agreement and incurred expenses in so doing amounting to about \$100; that they were as much attached to the child as though it was their own, and that it was for its best interests to leave it in their custody. They also alleged that respondent had no suitable place to keep the child; was without means to support it, and that there was no valid reason why she should not keep her agreement with them. No evidence was taken in the district court, the matter being submitted on the pleadings and an admission of counsel as to the length of time the child had been in appellants' custody, namely, five days prior to the filing of the petition

for the writ. The findings in the district court were that it did not appear that the child would become a public charge if returned to the mother, and it did not appear from the pleadings and there was no evidence that it would not be for the best interests of the child so to return it. Judgment was ordered accordingly, and this appeal is from the judgment.

Prior to the hearing in this court the parties stipulated "that the cause may be heard and decided without the taking of further evidence and upon the record as certified by Honorable C. S. Jelley, District Judge." The record so certified includes the findings and order for judgment to which we have made reference. The hearing was had in this court pursuant to the stipulation on July 7, 1921.

Appellants could not adopt the child without obtaining respondent's consent. Section 7153, G. S. 1917 Supp. Her refusal to consent still left the child in appellants' custody. They base their right to retain the custody on her agreement with them and on the claim that it is for the best interest of the child that it be left with them.

The written agreement created no binding obligations respecting the custody of the child. *State v. Anderson*, 89 Minn. 198, 94 N. W. 681; *State v. Armstrong*, 141 Minn. 47, 169 N. W. 249; *State v. Pelowski*, 145 Minn. 383, 177 N. W. 627.

The vital question is whether it is best for the child to leave it where it is or to restore it to its mother. The hearing in this court, by virtue of the statute, is a trial of the issues *de novo*. Section 8312, G. S. 1913; *Gauthier v. Walter*, 110 Minn. 103, 124 N. W. 634. The stipulation of the parties has made the record in the district court our only source of information in ascertaining the facts. We would have been better satisfied if testimony had been taken to show the actual conditions. In determining the future custody of a child, the formal allegations or pleadings do not adequately enlighten the court as to the actual situation. The pleadings consisted of the petition for the writ and the return to the writ. The return was not traversed as it might have been. Sec. 8301, G. S. 1913; *State v. Sheriff of Hennepin County*, 24 Minn. 87; *State v. Billings*, 55 Minn. 467, 57 N. W. 206, 794, 43 Am. St. 525. The claim of each party to the custody of the child rests entirely on the uncontroverted allegations of the pleadings. In considering these

allegations, we are guided by the rule that a mother has a natural right to and should not be deprived of the custody of her child, unless it is made to appear that the best interests of the child demand it. *State v. Pelowski*, *supra*. The presumption is that a mother is a fit and suitable person to be entrusted with the care of her child, hence in the present case the burden was upon the appellants to overcome the presumption by satisfactory evidence. *State v. Martin*, 95 Minn. 121, 103 N. W. 888.

Our consideration of the facts which appear from the pleadings is influenced by the legislative policy indicated in the enactments at the session of 1917, chapters 194 and 397, pp. 279, 561, Laws of 1917. Section 1 of chapter 397 declares that the term "dependent child" shall mean an illegitimate child. Section 11 provides that in no case shall a dependent child be taken from his parents without their consent, unless, after diligent effort has been made to avoid the separation, it shall be found needful to prevent serious detriment to the welfare of the child. It does not appear from anything before us that, if an effort is made to avoid a separation of the mother and child, it may not be avoided without serious detriment to the child's welfare. It does appear that on April 30, when the mother consented to part with her child, she was destitute. It also appeared from the allegations in the return that she has no suitable home or place where she can keep her child and that she is without means to support it. There is no showing that this condition will continue. Appellants assert that the law presumes that a condition once shown to exist will continue until the contrary is made to appear. Granting that this is so, we are unwilling to dispose of a child solely on the strength of a rule of evidence. There is nothing to show that respondent is unable or unwilling to work and earn enough to support herself and her child. We do not know whether she has relatives or friends able and willing to help her, or where or how she lives. In short, we are left wholly in the dark as to matters of vital importance in determining whether she should be deprived of her natural right to her child. The ties by which mother and child are bound together should not be severed except for grave and weighty reasons. The fact that this child may receive, at the hands of appellants, a better home than respondent can provide, is not a sufficient reason for depriving her of her offspring. *State*

v. *Armstrong*, supra. The mere fact that a mother is so destitute or impoverished that she cannot adequately provide for the needs of her child and that someone else is willing to take it and give it better educational and material advantages, does not justify the court in transferring its custody.

Aside from the fact that respondent has given birth to an illegitimate child, there is nothing to show that her character is such that she ought not to have its custody. It is suggested that she does not care for and was anxious to be relieved of it, or she would not have signed the agreement with appellants. Any force there may be in this suggestion is overcome by the fact that five days after she gave up her child she sought to regain it. It is urged that she cannot keep it, but will give it to someone who can provide for it. Assuming this to be true, the future welfare of the child will not be secured by leaving it with appellants, with no other right to its custody than the right of possession. Doubtless they are excellent people and would give the child a good home, but, until the mother's legal rights have been cut off by a decree of adoption, there can be no assurance that the ties of affection formed by the constant association of a child with its elders may not be severed at any time. This result would be detrimental to the welfare of the child and the source of lasting grief to appellants. The future should be definitely settled. It cannot be if the mother is unable to care for the child herself unless she consents to its adoption by someone to whom she is willing to entrust it. It is regrettable that appellants have been unable to obtain such consent. Without it there can be no permanent solution of the problem. We think it is best to restore the child to its mother, to be cared for by her or such other persons as may wish to adopt it with her consent.

The judgment is affirmed.

GREAT NORTHERN EXPLORATION COMPANY
v. BEN A. MIZEN.
MAHNOMEN MINING COMPANY, GARNISHEE.¹

July 15, 1921.

Nos. 22,013-22,061.

Assignment of mining option and lease — constructive trust.

The defendant and two others entered into an agreement, having as its object the development of a mining property on the Cuyuna range, an option on which was taken in the name of the defendant. The plaintiff corporation was organized to forward the project. The defendant's two associates were the officers of the company. Stock was issued to the defendant in consideration of the transfer of the option. A certain amount was equally divided among the three promoters, and another amount was donated to the corporation to be sold for the purpose of raising working capital for development. The defendant was a practical mining engineer, was in charge of the work of development, and was active in the affairs of the company. Shortly before the option expired, the defendant entered into an agreement with the plaintiff, whereby he might have the option at an agreed price and make such use of it, or of a lease taken under it, as he could. He took a lease and sold it for the price which he gave for the option and in addition a specified royalty on the output. It is *held*, under the facts stated in the opinion, that there was a relation of confidence and trust between the defendant and the plaintiff and its stockholders, and that he could not retain for himself the advance royalty received.

Action in the district court for St. Louis county to recover \$230,000 royalty on two million tons of ore and for an accounting. Defendant's demurrer to the complaint was overruled. The case was tried before Dancer, J., who made findings and ordered judgment in favor of plaintiff for \$2,623.43. From the order denying defendant's motion for amended and additional findings and conclusions or for judgment in his favor or for a new trial, and from the judgment entered pursuant to the

¹Reported in 184 N. W. 20

order for judgment, defendant appealed. Order and judgment affirmed.

Hugh J. McClearn, for appellant.

I. K. Lewis, for respondent.

DIBELL, J.

This action as it finally results is one to compel the defendant Ben A. Mizen to transfer to the plaintiff the royalty of $3\frac{1}{2}$ cents per ton granted to him in the assignment of a mining lease to Clement K. Quinn for \$15,000, and by the latter assigned to the Mahnomen Mining Company. The lease was executed to Mizen by the fee owners in pursuance of an option which, though in his name, was the property of the plaintiff mining company, and was by the company assigned and released to him that it might be assigned.

The defendant appeals from an order denying his motion for a new trial and from the judgment which in effect gives the $3\frac{1}{2}$ cent royalty to the plaintiff. The question is whether the defendant can retain the royalty for himself or holds it under a constructive trust for the plaintiff.

Mitzen was a mining engineer and apparently a capable one. L. J. Pitts was found by the court to be a competent office man experienced in mining work, and A. J. Peterson was found to be an experienced salesman of corporation stocks. Mizen had operated successfully on the Cuyuna range, in Crow Wing county. He had in prospect an option from the fee owners for a lease of lands on that range. Late in 1914 Mizen and Pitts and Peterson concluded to combine their efforts, acquire the mining option, and develop the lands covered by it to a point where the option or a lease taken under it could be sold. They were enthusiastic and saw visions of great things to come through the development of this and other properties. To carry out their project the plaintiff corporation was organized by Pitts and Peterson in January, 1915.

The option to Mizen was dated February 1, 1915. On February 3, 1915, he made a formal offer to transfer it to the plaintiff company in exchange for 75,000 shares of its capital stock of the par value of one dollar each. This offer was formally accepted. Twenty thousand shares were then transferred by Mizen to Pitts and a like number to Peterson. Fifteen thousand shares were donated to the plaintiff to be used in raising money for development. Those who bought chanced their money

on the proposition that the prospect was worth developing upon an assumed present worth of \$60,000. Enough of actual money was put in for organization expenses. There was no cash or liquid capital. That was to come from the sale of stock.

Pitts and Peterson maintained the office of the company in Duluth. An attractive prospectus was issued. The public was not greedy for the stock and sales had to be pushed. It was peddled about and sold, often in small quantities, and on instalment payments, and commissions were paid to Pitts and Peterson and subagents for selling. Something like 12,000 shares of the donated stock were sold, but not nearly so much as \$12,000 was received by the company. The exact condition of the stock account is not clear nor important just now. Thus the corporation was financed.

Mizen had the contract for the drilling at an agreed price. The total cost was \$10,050. He was paid \$2,422, leaving due \$7,628. In October, 1915, say about the twentieth, the company had no money, or, to be precise, it had \$5.21 in bank. What had been realized from the sale of the stock, except the \$2,422, had been used in maintaining an office in Duluth and paying the salaries of Pitts and Peterson, and incidental expenses. Mizen had financed the drilling, except for the \$2,422 paid him. The option expired on the first of November following. The late explorations were discouraging. Pitts and Peterson were losing hope and Mizen was anxious about his drill bill.

Clement K. Quinn was interested in the Mahnomen mine which adjoined. The property under option could be mined advantageously in connection with the Mahnomen. There was doubt whether it could be otherwise used profitably. Quinn had been mentioned as a possible purchaser. Mizen told Pitts and Peterson that Quinn had said that he would not give more than \$15,000 and this was so. He told them in effect that he could get no more and that it was all the property was worth. Quinn, knowing something of the condition of the company, would not deal with it. If he took the property he insisted that the option or lease come from Mizen.

In an amended finding the court, referring to the conditions then existing, found: "Under these circumstances it was agreed between said Peterson and said Pitts and said defendant that each of them

should surrender for cancelation fifteen thousand (15,000) shares each of the twenty thousand (20,000) they received for the assignment to the plaintiff corporation of the option of the defendant. That the plaintiff would execute to the defendant a release of all its right, title, interest and estate in and to the option which he had from the fee owners for a lease to the lands hereinbefore described, together with all the profits that defendant might make out of a lease taken thereunder, said agreement being contingent on said Peterson and said Pitts, as well as the defendant, each surrendering fifteen thousand (15,000) shares of his stock in the plaintiff company, and agreeing that neither said Pitts, said Peterson nor said Mizen should receive any dividend on the five thousand (5,000) shares of stock in the plaintiff company, which each of them would then hold; and further agreeing that defendant should pay plaintiff fifteen thousand dollars (\$15,000) for said option; seven thousand dollars (\$7,000) of said amount to be applied in payment of the seven thousand six hundred twenty-eight dollars (\$7,628) due him from plaintiff on his contract for drilling said lands, the remaining eight thousand (\$8,000) to be paid by the plaintiff company to all of its stockholders, who had paid cash for their stock and the balance remaining after the stockholders had been paid dollar for dollar, to be used in defraying any expenses incident to the conduct of the office of the plaintiff company since opening thereof in March, 1915."

An agreement and an assignment or release in writing dated October 28, 1915, and acknowledged October 29, 1915, were deposited in escrow to be delivered to Mizen upon his performance, within 21 days, of the conditions. Mizen was not required to perform or take the property. The instruments were, as observed by the trial court, somewhat in the nature of an option. However, as noted later, he did perform. The agreement recited that the company had given the defendant 75,000 shares of stock in consideration of the option and that he held 20,000 shares. It recited that he had carried on explorations at a cost of \$10,050, for which he had been paid \$2,422. Paragraphs 1, 2 and 3 were as follows:

"1. The party of the second part [Mizen] does hereby agree, upon the delivery of this agreement in the manner hereinafter provided, to pay to the party of the first part [plaintiff] the sum of eight thousand

(\$8,000.00), and to deliver or assign to it fifteen thousand shares of the capital stock of the party of the first part now appearing upon the company's records in the name of one Fallo, and the party of the second part does further agree to fully release and discharge the party of the first part from any or all claims of any kind whatsoever, which he may have or assert against it by reason of any of the transactions heretofore had between the parties hereto.

"2. The party of the first part, in consideration thereof, does hereby grant, bargain, sell, convey and release to the party of the second part any and all rights which it may have or might assert in or to said option for a mining lease, and in and to any mining lease which may be executed pursuant to said option, and in and to the leasehold estate which may thereby be created, and in and to the lands described in said option, and does assign, set over and release to the party of the second part any and all right to the proceeds or the consideration which he may in any manner receive out of said option or said lease, and does further release him from any or all claims which it might have or assert against him on account of any transactions heretofore had between the parties hereto.

"3. It is further agreed by and between the parties hereto that each of the parties hereto shall execute to the other a simple release of all rights or claims which it, or he, might assert against the other."

The assignment or release was executed at the same time and deposited in escrow in accordance with the terms of the agreement. The portion now quoted is sufficient for present purposes:

"That the party of the first part [Great Northern Exploration Company], in consideration of the sum of one dollar (\$1.00) and other good and valuable considerations, to it in hand paid by the party of the second part, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, convey and release to the party of the second part any and all rights which it may have, or might assert, in or to that certain option for a mining lease, dated on or about February 1, 1915 [naming fee owners and describing the property], and also all the right, title and interest, which it might have or assert in any mining lease which may be issued pursuant to said option, and in and to the leasehold estate which thereby may be created, and in and to the lands described in said option, and in and to the proceeds or other considera-

tion or profits which the said party of the second part may, in any manner, receive out of said option or said lease; and the party of the first part, for said consideration, does hereby further forever release and discharge the party of the second part from any or all claims which it might have or assert against the party of the second part on account of any transactions heretofore had between the parties hereto."

Mizen performed the conditions of the escrow agreement and received the two instruments about November 6, 1915, or soon afterward.

On October 29, 1915, he notified the fee owners of his election to take a lease. Under date of November 6, 1915, he assigned the lease to Clement K. Quinn. Before this he had obtained a reduction of the minimum output after the third year from 75,000 tons to 50,000 tons and also cleared some minor defect in the title. The assignment of the lease was acknowledged December 9, 1915. By an instrument dated and acknowledged on November 11, 1915, Quinn assigned the lease to the Mahnomen Mining Company. This instrument recited that the lease from Mizen to Quinn was delivered on November 10.

In performing the terms of the escrow agreement, Mizen, so the court finds, used the money obtained from Quinn. Something of this kind was contemplated when the agreement was made. The company received the equivalent of \$8,000, and Mizen took \$7,000 for his claim of \$7,628. This was in substantial accordance with the agreement.

The court finds that about October 20, 1915, Mizen became convinced that he could sell to Quinn for at least \$15,000; that he told Pitts and Peterson that he thought he would dispose of it for such sum; that he told them he could get no more for it; that he told them he had tried to get an increase over the royalty fixed; that Pitts and Peterson believed these statements and relied upon them, and that so relying executed the two agreements.

It does not seem that Mizen had abandoned hope of getting an additional royalty when the agreements recited were made and put in escrow. On the day of their execution he suggested to Quinn an increased royalty and received encouragement. He had before been negotiating with the fee owners for a decrease of the minimum output and finally obtained the reduction stated. This was advantageous to the purchaser of the lease, made the lease more salable, but was less favorable from an in-

come standpoint to the seller. It was something which Quinn wanted. There was also a defect in the title which Mizen cured.

The question now comes whether Mizen could take to himself the $3\frac{1}{2}$ cents additional royalty, or whether it should be applied to the use of the plaintiff corporation. That a stranger making the agreements which Mizen made would be entitled to the additional royalty is clear. The trial court was of the opinion that Mizen was not in a position where he was dealing at arm's length with the company, and it was of the opinion that Mizen when he learned, as he did before the closing of the deal with Quinn, that he could get a royalty of $3\frac{1}{2}$ cents, was bound to disclose and could not take it for himself. This latter view was based on the doctrine stated in 13 C. J. 389, § 291, as follows: "If a person makes a representation believing it to be true but afterward discovers it to be false, he must not allow the party to go on and act on the faith of the representation; if he does so he is guilty of fraud."

A number of cases are cited in support of the doctrine. They, in general, are cases of actual fraud, or cases where in the course of negotiations, and before the fixing of rights by a completed contract, a material change comes or a fact is discovered which makes a previous representation untrue. Then the maker of the representation must disclose. The trial court seems to have applied this principle, upon the supposition that when Mizen found that he could get a royalty from Quinn he had not changed his position. In a later memorandum the court indicates that it was mistaken in this respect, for Mizen at the time had taken the lease and assumed the obligations attaching to it. We gather from the findings and amended findings and the memoranda that the court was not of the view that there was actual fraud prior to October 29 avoiding the agreements then made. And we do not understand that the court would have held that a stranger could not have taken to himself the benefits of such an advance royalty as was secured.

In commenting upon the relation of the parties the trial court says in its first memorandum: "Defendant's alliance with Pitts and Peterson was an unfortunate one for him. All the benefit he derived from it was the use for a time of \$2,422.00 paid to him on account of the drilling, while it costs him more than two-thirds of the ultimate profits of the transaction. In entering into the arrangement he undoubtedly

relied upon what proved to be quite extravagant ideas of Pitts and Peterson as to the amount of stock they could sell to the public. When it developed that they could not raise money as fast as it was needed for the exploration, defendant undertook for a time to protect himself to some extent by retaining the option in his own name. And later on he attempted to secure the general stockholders from actual loss by an agreement with Pitts and Peterson that they should pay back to these stockholders, out of the \$8,000.00 turned into the company, whatever cash they had paid for their stock, which agreement was carried out in part only by Pitts and Peterson. But defendant could not protect himself in that manner. While the corporation was organized simply as an instrument to further the interests of the three individuals, yet stock thereof was sold to the general public at the investigation and with the approval of all; and the purchasers of this stock became entitled to share in any profits, regardless of the circumstances under which defendant associated himself with Pitts and Peterson. These stockholders became entitled to demand the utmost good faith and fidelity to their interests from their officers, and through them, from defendant."

The venture initiated in the fall of 1915 by Mizen, Pitts and Peterson, was a joint one. Each was entitled to repose confidence in the others and to insist upon the utmost good faith. Each was to work for all. All three contemplated that money for development would come from stockholders investing in the hope of profit. The three received \$60,000 in stock which was taken as representing the value of the option. They risked nothing, or next to nothing, just the cost of organization. Pitts and Peterson got salaries and commissions; Mizen presumably profited on the drilling. The men who purchased the \$15,000 of donation stock, if that much had been sold, paid for the development and risked their money with no hope of getting all of it back, unless the property proved to be worth \$75,000, and for a value in excess of that they shared in the proportion of one-fifth to four-fifths. Pitts and Peterson and Mizen could not be unfair to them. The relation was confidential. Each owed to his associates and the stockholders open good faith and active diligence in their interests. Neither of the three could speculate upon the sale of the property for the development

of which the stockholders were paying, and take a profit to himself. The principle which forbids, as applied to this case, is troublesome and the result recorded is not free of doubt, but we are constrained to hold that Mizen, who was the active man in the actual development and disposition of the property, and active in the affairs of the corporation, was so situated that he could not make a profit by the contract with Quinn, though he was free of actual fraud or wrongdoing.

The position of Mizen, from the viewpoint of his counsel, is forcefully presented, and merits and has received thorough consideration. It is argued that in October, 1915, when negotiations commenced, the company was without funds, and that it owed Mizen over \$7,000, and owed others, and all this is true; that the mine was not showing well; that things looked gloomy; that the three promoters were discouraged; that Mizen thought he could sell for \$15,000; that, unless something was done by November 1, all was gone; that Mizen was anxious for his \$7,000; that it was desired to protect the stockholders who had chanced their money on the development; that the arrangement made would do this, and would leave them their stock, while the original \$60,000 stock would be reduced to \$15,000; that Mizen, by taking the lease, assumed liabilities which would not have rested upon him if the contract had not been carried out; that he took the risk of not being able to sell it; that he assumed liabilities when he assigned to Quinn with a warranty; that he obtained a reduction of the minimum output, which he did not owe the duty of doing for the plaintiff company, and likewise cured defects in the title; that what Quinn got by the assignment was not a lease such as was called for by the option, but a lease with a reduced minimum output, and with the warranty of Mizen; that the plaintiff, after full consideration and upon authority of its board of directors, gave him just what he now claims; that, but for the contract with him, the company and its stockholders might have gotten nothing; that he was taking a chance of losing; that he might have sold for \$10,000, if he could get no more, in which event he would have been required to pay \$8,000 to the plaintiff just as when he made a better sale; that the contract was made openly and was fair; that the agreement of the company was to convey to him "all rights which it may have or might assert" in the option, and "all right to the proceeds

of the consideration which he may in any manner receive out of said option or said lease," and to "release him from any or all claims which it might have or assert against him on account of any transactions heretofore had;" that the release executed by the company conveyed and released to him all the right, title and interest which it might have or assert "in and to the proceeds or other consideration or profits which the said party of the second part [Mizen] may, in any manner, receive out of said option or said lease;" that it was contemplated that he should have the chance of a profit and that he took a chance of loss; that his position was not such that he could not deal at arm's-length with the company, and that, in any view of it, the arrangement under all the circumstances was fair to the corporation and its stockholders and a prudent one to make.

It is true of course that even a director or officer may make a fair contract with his corporation. *Minnesota L. & T. Co. v. Peteler Car Co.* 132 Minn. 277, 156 N. W. 255, and cases cited. We are, however, of the opinion that the relation of Mizzen to the stockholders, those who were furnishing the development money, as well as those who were promoters with him, was such that he could not make a private profit out of turning the property, though in disposing of it he assumed liabilities which he was not under obligation to the company to incur, and though he was not guilty of intentional wrongdoing.

The defendant complains that Pitts and Peterson did not dispose of the \$8,000 for the benefit of the stockholders, as the agreement was, but appropriated it largely to themselves. The finding is that the "agreement was carried out in part only by Pitts and Peterson." They are not parties and nothing can be done about it here. If they did wrong in the disposition of the \$8,000 relief can be had in some form, but not in this proceeding as it now stands.

Order and judgment affirmed.

HOLT, J. (dissenting).

The situation and the claims of the parties are clearly and concisely stated by Justice Dibell, but the result reached does not appeal to me as right nor compelled by the doctrine invoked. The findings and record accord to defendant the utmost good faith in all his dealings with

plaintiff and its officers, his associates Peterson and Pitts, save in this, that, between the time he made the contract to purchase the option of plaintiff and the time he took it out of escrow by payment, he ascertained that he could obtain a royalty from Quinn in addition to the \$15,000 which, when the contract was executed, he had told Peterson and Pitts was the highest amount Quinn would pay.

From the beginning defendant refused to be an officer of plaintiff, but, concede that he was in the same condition as if an officer, he could, nevertheless, properly enter into a fair contract with the corporation. *Minnesota L. & T. Co. v. Peteler Car Co.* 132 Minn. 277, 156 N. W. 255. It seems to me the contract he did make was fair, and, under all the circumstances, fairly made. When it was entered into there was hope and belief, but no certainty, that defendant would be able to dispose of the option thereby transferred to Quinn so that he could pay \$8,000 to the corporation and get sufficient to pay the whole or most of the claim that he held against it. Plaintiff was then at that stage where it was evident to all that no profit could be realized for the stockholders. It was a question of saving something for them and paying the liabilities. Defendant stood a chance of losing a large sum which he alone had risked in exploring for ore under the option, and, unless he was willing to make the effort to realize something therefrom, all concerned would certainly sustain a loss. In order to be able to realize the amount defendant was to pay under the contract, it was, no doubt, clearly understood that he would have to sell and dispose of the option. The contract so indicates. In order to dispose of the option to Quinn he had to secure a modification of its terms, and incur certain personal obligations. The option he transferred to Quinn was in a more valuable state than when transferred to him. It was, no doubt, well understood that for the efforts he was to make he stood the chance of loss or gain. The contract was deliberately made by plaintiff and its officers. It was completely executed and irrevocable as to them. It could not be taken out of escrow or recalled by them because of anything thereafter developing. It contains no provision looking towards its cancelation by plaintiff, if defendant could dispose of the option at a higher price than the one he had represented that Quinn might be induced to give.

. Suppose defendant had gone to plaintiff's officers and informed them that he had succeeded in obtaining twice the price and twice the royalty that he did obtain, would plaintiff have been in a position to recall the escrow? I think not, under the finding that defendant had exercised the utmost good faith and had disclosed all that was known to him, as to the probability of his being able to dispose of the option and for what price, when the contract was signed and placed in escrow.

It is clear to me that the parties dealt at arm's-length, not only when the contract was negotiated, but also intended that when it was put in escrow it terminated all confidential relations that ever existed, so that as to what was developed thereafter and as to any knowledge or advantage thereafter gained, no obligation rested on defendant to disclose it. Neither the contract nor any tacit understanding required defendant to sell the option to Quinn or to any one. Suppose he had taken it over himself and successfully mined so as to make many times the profit now made, would that have given the plaintiff a cause of action? It would seem not. Again, suppose he had not succeeded to dispose of the option to Quinn, but had sold it to some one else for a better price and better royalty than he did obtain, could this action have been maintained? The answer must be the same, for even if he had informed plaintiff and Peterson and Pitts that he had made such a sale, before he took the contract out of escrow, I see no way in which he could have been prevented from holding onto a bargain fair and just when made. On the findings of fact as they stand I think defendant is entitled to judgment.

JOHN N. OHMAN, AS RECEIVER OF THOR LAUNDRY &
SPECIALTY COMPANY v. OLIVER J. LEE.¹

July 15, 1921.

No. 22,166.

Assignment of stock upon record without surrender of certificate.

1. Where the holder of capital stock sells, assigns and delivers it to

¹Reported in 184 N. W. 41.

another, and in the assignment authorizes the corporation to transfer the stock to the purchaser on its records, the corporation, on learning of such assignment, may make such transfer on its records without a surrender of the stock or a request from the purchaser.

Authority to transfer stock on record.

2. By purchasing the stock, the purchaser gave authority to transfer it to him of record.

Corporation may waive statutes and by-laws.

3. The provisions of the statutes and of the by-laws regulating the transfer of stock are for the benefit of the corporation and may be waived by the corporation.

Record of transfer on stubs of stock certificates held a transfer book.

4. Where the corporation recorded the transfer of stock on the stubs from which the certificates were detached and kept no other record thereof, such stubs constituted the transfer book of the corporation and were evidence of the transfers noted thereon.

Presumption in reference to stock transfers on records.

5. Transfers appearing on the records are presumed to have been properly made, and, as there is nothing to impeach the record of the transfer of the stock in controversy to defendant, he was a registered stockholder and liable to creditors as such.

Stockholder exercising rights and recognized as such liable to creditors.

6. Where the purchaser of capital stock thereafter exercises the rights of a stockholder and is recognized as such by the corporation, he thereby acquires the rights and becomes subject to the liabilities of a stockholder, although his stock may not have been transferred to him on the records.

Action transferred to the district court for Goodhue county to recover \$6,000 on defendant's liability as stockholder in an insolvent corporation. The case was tried before Johnson, J., who made findings and ordered judgment in favor of defendant. Plaintiff's motion for amended findings and conclusions was denied. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

Joss, Ohman & Fryberger, and Louis H. Joss, for appellant.

A. J. Rockne, for respondent.

TAYLOR, C.

An execution against the Thor Laundry & Specialty Company having been returned unsatisfied, proceedings were instituted by creditors which resulted in the appointment of plaintiff as receiver of the company, and in an assessment against all the stockholders of the company of 100 per centum of the par value of their stock. Plaintiff as such receiver brought this action against defendant to recover the amount of the assessment upon 600 shares of the stock, of the par value of \$6,000, of which defendant was alleged to be the owner. In his answer defendant denied that he was, or ever had been, the owner of any of the capital stock of the company.

That plaintiff is entitled to collect the amount of the assessment from all stockholders, was established at the trial and is not disputed. The controversy is whether defendant is liable as a stockholder.

That defendant, on April 3, 1915, purchased 400 shares of the capital stock of the company of the par value of \$4,000, represented by certificates numbered 6, 7, 8 and 9 for 100 shares each, from Ole J. Olsen, and that Olsen, by written assignment indorsed thereon, duly transferred such certificates and the stock represented thereby to defendant, and authorized G. R. Howes, secretary of the company, to make the transfer thereof on the books of the company, and that Olsen delivered such certificates and assignments to defendant who has held and retained them ever since, is found as a fact by the court and stands undisputed on this appeal. But the court also found that this stock had never been transferred to defendant on the books of the company and that defendant never became a registered stockholder of the company, and apparently on this ground held that defendant was not liable for the assessment and rendered judgment in his favor. Defendant seeks to sustain the judgment on the ground that he was not a registered stockholder and that only registered stockholders are liable for such assessments.

If defendant was a registered stockholder, he is clearly liable for the assessment. The stock certificates were bound in book form. When a certificate was issued, it was detached from the stub and entries were made in a blank form on the stub, showing the number of the certificate, the number of shares, to whom issued and the date of issue.

The stub also contained a blank form in which to note transfers, and when stock was transferred entries were made in this form, showing from and to whom the stock was transferred, the date of transfer, the number of the original certificate, the number of original shares therein and the number of shares transferred. This was the only record of transfers of stock kept by the company, and, while it does not contain all the information required by the statutes to be kept in the stock book, it is, nevertheless, the transfer book of the company, and is evidence of the facts properly entered therein. *Holland v. Duluth I. M. & D. Co.* 65 Minn. 324, 68 N. W. 50, 60 Am. St. 480; *Randall Printing Co. v. Sanitas M. W. Co.* 120 Minn. 268, 139 N. W. 606, 43 L.R.A. (N.S.) 706.

The stubs of the certificates in question show that the certificates were issued to Ole J. Olsen, January 30, 1915, and were transferred from Olsen to defendant April 3, 1915. Defendant claims that this transfer was ineffective, for the reason that it was made without his knowledge, and that he had never surrendered the original certificates to the company and had never asked for or received new ones. All that appears in reference to these transfers is the fact that the entries were made by Howes, who was secretary of the company at that time, and that they were not made at the instance of defendant or with his knowledge.

Defendant seems to assume that they could be lawfully made only at his instance. In this he is in error. While it is true that a person cannot be made a stockholder without his consent, the purchase of the stock by defendant of itself gave authority to make the transfer without any further act on his part. *Basting v. Northern Trust Co.* 61 Minn. 307, 63 N. W. 721. Olsen had the right to have the stock transferred on the books, for he was responsible to the company and its creditors for all liabilities which might accrue against the stock prior to such transfer. The by-laws provide that the transfer of stock "shall be made by indorsement on the certificate and surrender of the same to the company, and new certificates shall be issued to the person entitled thereto." Except under special circumstances, which did not exist in this case, the company could not be compelled to transfer stock without the surrender, or at least the presentation, of the old certificates,

but this requirement was for the benefit of the company and could be waived by the company. *Basting v. Northern Trust Co.* 61 Minn. 307, 63 N. W. 721; *Prince Inv. Co. v. St. Paul & S. C. L. Co.* 68 Minn. 121, 70 N. W. 1079. If the company, after learning of the sale from Olsen to defendant, saw fit, either at the instance of Olsen or of its own volition, to accept defendant as a stockholder, it had the right to enter the transfer on its records, even against the objection of defendant. *Basting v. Northern Trust Co.* 61 Minn. 307, 63 N. W. 721.

The circumstances under which these transfers were made do not appear; we merely know that they were entered of record by the officer charged with the duty of keeping the records and of making such entries. Neither this officer nor Olsen were called as witnesses. Transfers appearing on the records are presumed to have been properly made, until the contrary is shown. *Bartlett v. Stephens*, 137 Minn. 213, 163 N. W. 288. There is nothing to impeach this record, and the fact that it was made without the surrender of the old certificates or the issuance of new ones is immaterial. *Basting v. Northern Trust Co.*, 61 Minn. 307, 63 N. W. 721. It follows that defendant was a registered stockholder and that the finding to the contrary cannot be sustained.

Furthermore the fact that defendant is a stockholder has been continuously recognized, both by himself and by the company, ever since he purchased the stock. At or about that time he was elected a director, but resigned a few months later because he was unable to attend the meetings. He attended the next annual stockholders' meeting and was listed at that meeting as entitled to vote stock in the amount of \$4,000. At this meeting he was again elected a director. Thereafter he attended a part of the directors' meetings and gave a written waiver of notice of others which he was unable to attend. He carried on an extended correspondence with the secretary and manager of the company concerning the management of its business affairs, in which he was referred to as one of the heavy stockholders. He gave the secretary a written proxy to vote his stock in the amount of \$4,000 at a stockholders' meeting which he was unable to attend. The facts are ample to show that he recognized himself as a stockholder, and that the company had accepted him as such.

It has been held from an early date that the statutes regulating the

transfer of capital stock were intended solely for the benefit of the corporation, and that the owner could sell and transfer his shares at will, subject only to the right of the corporation, if it so elected, to treat him, instead of the purchaser, as owner of the stock and liable for all obligations growing out of such ownership, until the transfer was entered of record. In *Lund v. Wheaton Roller Mill Co.* 50 Minn. 36, 52 N. W. 268, 36 Am. St. 623, the court said that this rule had then been applied so long that they felt constrained to continue it under the doctrine of *stare decisis*. As a corollary to this rule, it is recognized that the corporation may waive the requirements of the statutes and of the by-laws in respect to the transfer of stock, and may accept the purchaser as a stockholder, although his stock has not been transferred to him on the records. If the purchaser exercises a stockholder's rights and thereby assumes the status of a stockholder, and the corporation recognizes him as such by acquiescing therein, he becomes entitled to the rights and subject to the liabilities of a stockholder as effectively as if his stock had been transferred to him on the records with all the prescribed formalities. *Basting v. Northern Trust Co.* 61 Minn. 307, 63 N. W. 721.

It follows from what we have said that we are unable to sustain either of defendant's propositions. The record shows that he was in fact a registered stockholder. It also shows that, even if he were not a registered stockholder, he had assumed the status of a stockholder and had been recognized as such by the corporation and had thereby acquired the rights and become subject to the liabilities of a stockholder.

The claim that defendant was the owner of any stock other than the 400 shares represented by the stock certificates numbered 6, 7, 8 and 9 was abandoned at the trial.

The judgment is reversed.

MICHAEL J. O'NEIL v. WATSON P. DAVIDSON.¹

July 15, 1921.

No. 22,226.

Evidence sufficient that broker was agent of lessor.

1. The evidence is sufficient to sustain a finding that a broker who negotiated a lease of certain property in controversy was the agent of the lessor.

Untrue statement of income and expenses submitted by broker to lessee.

2. There is evidence that the broker submitted to the lessee an untrue statement of the income of the property and the expenses of operation, as a statement covering the preceding year. If the broker was the agent of the lessor, it is not material when or by whom the statement was prepared.

Evidence sufficient that lessee relied on untrue statement.

3. There is evidence that the lessee relied on the statement as to expenses of operation.

Discovery of true income does not charge lessee with knowledge of actual expenses.

4. The evidence was not conclusive that the lessee waived the alleged fraud. The fact that before taking possession he discovered the untrue character of the portion of the statement relating to income, does not conclusively charge him with knowledge of the facts as to the portion relating to expenses of operation.

Damages — evidence sufficient to support verdict on theory of charge to jury.

5. There is evidence to sustain the finding of damages on the theory on which the case was submitted.

The former appeal by defendant from the denial of a new trial is reported in 147 Minn. 240, 180 N. W. 102. Defendant's motion for judgment for \$5,000, notwithstanding the verdict for \$886.94, was denied. From the judgment entered on the verdict, plaintiff appealed. Affirmed.

¹Reported in 184 N. W. 194.

Baldwin Schroeder and Linus O'Malley, for appellant.
Lightner & Young, for respondent.

HALLAM, J.

On March 22, 1917, plaintiff leased to defendant the Globe Building, an office building in St. Paul, for the term of 99 years. The first year's rent was paid in advance, and thereafter defendant paid rent monthly until April 1, 1919. This action was brought to recover \$5,000, the rent from April to August, 1919, inclusive. Defendant counterclaimed, alleging damages for misrepresentation inducing the lease. The jury returned a verdict for plaintiff in the sum of \$886.94. They thus allowed defendant \$4,213.06 on his counterclaim. Defendant moved for a new trial, contending that he was entitled to greater damages. The motion was denied and defendant appealed. The order was affirmed. *O'Neil v. Davidson*, 147 Minn. 240, 180 N. W. 102. Plaintiff moved for judgment notwithstanding the verdict. The motion was denied and judgment was entered. Plaintiff has now appealed.

1. The representations relied upon are alleged to have been made by William Egeland, a broker concerned in the negotiation of the lease. The claim is that Egeland submitted a written statement showing that the gross annual rent of the building was \$33,168, and the total annual expense of maintenance and operation was \$15,557.80, and that these figures were untrue.

Plaintiff contends that the proof is not sufficient to show that Egeland was his agent. We think it is. It appears that Egeland had some talk with defendant pertaining to a lease of the Globe Building before he secured any agency agreement from plaintiff, but this is not uncommon and is not necessarily inconsistent with his ultimate agency for plaintiff. Egeland testified that he was plaintiff's agent; that he had an oral agreement with plaintiff to act as his agent for a stipulated commission long before the lease was closed and that, on the same day on which the lease was closed, an agreement between them was made in writing, which agreement recited that Egeland had negotiated the lease for plaintiff, and in which plaintiff agreed to pay Egeland a commission. Plaintiff denied the agency and gave such an explanation of the making of the written contract that it was probably not conclusive upon

him, but the evidence is sufficient to sustain a finding that Egeland was plaintiff's agent.

As above stated, the claim of misrepresentation is that, during the course of the negotiation, Egeland submitted to defendant a statement containing an untrue showing of the income of the building and the expense of its operation. This statement showed "gross rentals \$33,168," and "expenses" aggregating \$15,557.80, itemized under sub-headings as follows: Taxes, \$4,128; insurance, \$250; coal, \$3,850; water, \$325; light, \$540; labor, \$5,340; toilet service, \$124.80; repairs and incidentals, \$1,000; showing also a balance to the good of \$17,610.20.

It is not shown that plaintiff prepared this statement, but this is not material. If, as the jury found, Egeland was plaintiff's agent, the result of his submitting it is the same as though it had been prepared by plaintiff himself.

The statement was an old one which Egeland had in his office, but the evidence sustains a finding that it was submitted to defendant as a statement as of the preceding year. There were large items of expense, such as for power and manager's charges, which were not mentioned in the statement, but we think it a permissible inference from defendant's evidence that it was submitted as a complete statement. The evidence shows that the actual expenses were substantially more than the total of the statement submitted, or, in other words, that the statement was untrue.

3. Plaintiff contends that defendant did not rely on this statement. His testimony is that he did.

The evidence is that defendant discovered the facts as to the rental return prior to the time that he took possession of the building. Any representation as to rentals was therefore waived and was properly eliminated by the trial court.

We think there is sufficient evidence that defendant relied on the representations as to the expenses as shown in the statement. In one part of defendant's testimony, he said he relied on the showing of the statement as to the net return, but this does not seem to us at all conclusive that he placed no reliance on the showing of expense of maintenance. This was one of the items that went to make up the

net return. Even if he was influenced only by the net return, he might be misled by a statement false only as to the items on one side of the ledger.

There is evidence that defendant knew that there was some expense for power and manager's charges, but we think it does not conclusively appear that he knew these expenses were not included in the statement.

It appears that defendant was a man of large experience in realty matters, but we still think a jury might find that he had been deceived.

4. Nor do we think the proof conclusive that defendant waived the fraud for which he recovered damages. The damages recovered were, by the court's instructions, limited to those arising prior to the discovery of the falsity of the representation. From the amount of damages allowed, we must infer that the jury found that the falsity of the representations was not discovered for something like the period of a year. The claim of waiver is based on the contention that defendant was charged with knowledge of the falsity of these representations at the time he took possession under the lease. The evidence as to this is not conclusive against defendant. He had knowledge at that time of the falsity of the statement as to rentals, but there is evidence that he had not such knowledge as to the expenses. Nothing in the decision on the former appeal was intended to conclude defendant on this point.

5. The court instructed the jury that the measure of damages was the difference between the represented expense and the actual expense of operation, from the time of the commencement of the lease until defendant was chargeable with knowledge of the true state of facts. No exception was taken to this charge and no error is predicated upon it. There is evidence from which the jury might, on this basis, compute damages in the amount allowed.

Judgment affirmed.

FRUEN CEREAL COMPANY v. E. J. CHENOWETH.¹

July 15, 1921.

No. 22,319.

No prejudice in excluding testimony of fact subsequently conceded.

1. Excluding testimony to prove a fact which later in the trial was conceded, cannot be prejudicial.

No prejudice in excluding testimony when objector's concession satisfies questioner.

2. Nor can error be predicated upon a ruling sustaining an objection to a question, where a concession by the objector answers the question so that the party examining is seemingly satisfied.

No showing that question objected to was material.

3. It is not made to appear that a question asked on rebuttal was material when the objection thereto was sustained.

Action in the district court for Hennepin county to recover \$1,008 damages for breach of contract in sale of carload of flour. The answer alleged that the flour was in all respects the kind and grade agreed to be delivered. The case was tried before Fish, J., and a jury which returned a verdict in favor of defendant. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

George S. Grimes, for appellant.

Webber, George & Owen, for respondent.

HOLT, J.

Action to recover damages against the seller for delivering a carload of wormy flour instead of the flour alleged to have been bought and paid for. Defendant had a verdict and plaintiff appeals from the order denying a new trial.

Plaintiff's contention, as alleged in the complaint, was that it purchased the "best patent old spring wheat" flour, and defendant's that

¹Reported in 184 N. W. 30.

the flour delivered was the kind and grade purchased by plaintiff. Plaintiff deals in flour and also operates a mill in Minneapolis. Defendant owns and runs a small flour mill in Wisconsin. A firm of brokers in Minneapolis obtained from defendant samples of the flour he grinds with a view to sell on commission. One of these samples was exhibited to plaintiff by the brokers and an order, directed to defendant, was given for two carloads of flour of 210 barrels each at \$10.80 per barrel. When the first carload was received, plaintiff notified defendant that the flour was below grade and sample. Defendant came to Minneapolis and sought to adjust the deal. At that time the claim was also made that the flour was infested with worms.

The assignments of error are all upon rulings excluding testimony. The first group of questions, to which objections were sustained, relate to whether or not the carload in question was "best patent wheat flour." When the rulings were made, the order for the purchase had not been offered and it had not appeared that a letter of confirmation, written by plaintiff to defendant, containing the terms of the contract, as claimed by plaintiff, had ever been received by defendant. In fact, no order was ever offered in evidence, and defendant denied the receipt of the letter of confirmation. In that state of the evidence the court deemed it proper not to permit the questions, but to hold them in abeyance until it was seen what would develop. Afterwards defendant expressly admitted that the flour was not of the grade known as "patent" flour. So that, were it conceded that the questions were proper when asked, the subsequent admission established the fact sought to be elicited, and no prejudice resulted from the rulings.

The next question sustained was this: "Is the grade patent or best patent wheat flour a well known and recognized grade of flour in the trade?" In the discussion which followed the court stated that he saw no harm in permitting an answer, but then plaintiff's counsel said he proposed to follow the inquiry by showing that the only way one could tell whether a sample was "patent flour" or "straight flour" was by a chemical analysis. At this point defendant conceded and admitted that the flour delivered was not "patent" but "straight flour," the only grade he makes, and the plaintiff's counsel, seemingly satisfied, dismissed the witness, saying: "If that is conceded, that is all."

Plaintiff lastly complains because, on rebuttal, its manager was not allowed to testify whether a sample of the flour delivered had been submitted to a flour laboratory for examination. No argument as to the materiality of an answer to the question has been presented, and none occurs to us, for, as stated, there was then no dispute as to the grade of that flour. If intended merely as a preliminary question to lay the foundation for the testimony of the next witness called, the one who appears to have made such examination, for the purpose only of impeaching the chemical analysis made by defendant by the suggestion that the sample analyzed by defendant's witness might not have been taken from the flour in question, that purpose should have been disclosed before the ruling was made. The trial court took the purpose to be not rebuttal, but to show, as plaintiff's counsel also stated, that the flour was ground from musty wheat, a matter which plaintiff should have adduced evidence of before the defense opened.

The disputed issues in the case were clearly and concisely submitted to the jury. The remark of the learned trial court, in the early stage of the trial, that the proof indicated a sale by sample, could not have harmed plaintiff, for, when the testimony was all in, it was left to the jury entirely to determine whether or not the sale was by description also. The contention that plaintiff did not have the opportunity to prove damages on the theory of a sale by description, appears to us to be of no merit. The only witness on values and damages was plaintiff's manager who made the deal, and he testified that the price paid, \$10.80 per barrel, was the fair market value of the flour he intended to buy, and that the flour delivered was worth only \$6 per barrel. There was no offer to show the difference in value between the grade known as "patent" flour and that known as "straight" to which any assignment of error is directed.

The order is affirmed.

STATE EX REL. CHICAGO, BURLINGTON & QUINCY RAIL-
ROAD COMPANY AND ANOTHER v. THE PROBATE
COURT IN AND FOR HENNEPIN COUNTY
AND ANOTHER.¹

July 15, 1921.

No. 22,328.

When defendant can object to appointment of administrator who is suing him.

1. One against whom an administrator asserts a right of action has no standing in the probate court to object to the administrator whom the court has appointed, unless the appointment is void on the face of the record.

When action lies in Minnesota for wrongful death of nonresident outside of state.

2. An action may be maintained in this state to recover on a claim for wrongful death of a nonresident of the state, suffered out of the state. An administrator may be appointed in this state where the only asset is such a death claim.

Appointment of foreign administrator does not affect jurisdiction of probate court.

3. The fact that an administrator has been appointed in another state and an action on the death claim commenced there, does not go to the jurisdiction of the probate court of this state.

Upon the relation of the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railroad Company, the district court for Hennepin county granted its writ of certiorari directed to the probate court for that county and the Honorable John A. Dahl, judge thereof, to review the order of the probate court denying relators' petition for an order revoking and annulling special letters of administration and vacating proceedings in that court on the ground the court had no jurisdiction. The matter was heard by Leary, J., who

¹Reported in 184 N. W. 43.

quashed the writ. From the order quashing the writ, relators appealed. Affirmed.

Stringer & Seymour and Barrows, Stewart & Metcalf, for appellants.
Tautges & Wilder and J. H. Sapiro, for respondents.

HALLAM, J.

Conrad Sohl was a resident of Saunders county, Nebraska. On March 26, 1920, he was killed in Nebraska in a collision between a train and a gasoline speeder. It is claimed both relators are liable in damages for his death under the Federal Employer's Liability Act of April 22, 1908. Kate Sohl, the widow of deceased, made application to the probate court of Hennepin county, asking for the appointment of a special administrator of the estate of deceased. The petition alleged that petitioner was then of Hennepin county; that deceased died a resident of Saunders county, Nebraska, leaving no personal property there, and that the property of deceased consisted in part of a claim for wrongful death against both relators, and asked that the Wells Dickey Trust Company be appointed special administrator. Thereupon the probate court made an order appointing said company as special administrator and special letters of administration were issued accordingly.

The special administrator commenced suit against relators to recover damages for the death of Sohl. Thereupon relators petitioned the probate court for an order revoking and annulling the special letters of administration and vacating all proceedings in that court on the ground that the probate court had no jurisdiction in the premises. The probate court denied the petition and certiorari is brought to review this determination.

The facts on which the claim of relators is based are in substance as follows: Sohl was a resident of Nebraska; the accident occurred in Nebraska and Sohl died there; it is claimed that his dependents live there, though the record in the probate court of Hennepin county recites that the widow is "of said county." An administrator was appointed by a Nebraska court and said administrator, before the commencement of proceedings in this state, brought action in Nebraska on said death claim against the relator Rock Island Railway Company. Said action was removed to the Federal court of that district and is there pending.

1. Respondent challenges the right of relators to question the regularity of the appointment of the administrator in this state. It is doubtless true that a mere debtor of an estate, or one against whom an administrator asserts a right of action, has no concern with the personnel of the administrator and has no standing in court to object to the administrator whom the court has appointed. In *re Hardy*, 35 Minn. 193, 28 N. W. 219. We think it also true that such a person has no right to review the probate court's determination of jurisdictional facts. His only concern is that he may be assured that, when he makes payment, that payment will discharge the debt paid, and that, if sued, the determination of the suit will be an adjudication final and binding. Unless the proceeding in which the administrator is appointed is void on the face of the record, he is so protected. *Fridley v. Farmers & M. S. Bank*, 136 Minn. 333, 162 N. W. 454, L.R.A. 1917E, 544. Payment to an administrator whose appointment is on its face void, affords him no protection, and, when such an administrator brings suit against him, we are of the opinion that he may, either in the probate court or in the court in which the suit is brought, have the void appointment judicially declared void. This is inferable from the principles stated in *Bombolis v. Minneapolis & St. L. R. Co.* 128 Minn. 112, 150 N. W. 385; *Fridley v. Farmers & M. S. Bank*, *supra*. See also *Reynolds v. Lloyd Cotton Mills*, 177 N. C. 412, 99 S. E. 240, 5 A.L.R. 284; *Jeffersonville R. Co. v. Swayne's Admr.* 26 Ind. 477. The decision in *In re Hardy*, *supra*, should not be construed as committing the court to a contrary doctrine.

2. The appointment of this administrator was not void on its face. On the contrary, the record of the probate court is perfectly regular. An action may be maintained in this state to recover on a claim for wrongful death of a nonresident of this state suffered out of the state. This was held in *State ex rel. Bossung v. District Court of Hennepin County*, 140 Minn. 494, 168 N. W. 589, 1 A. L. R. 145, where the action was brought by a foreign administrator. If such an action may be maintained by a foreign administrator, it seems quite clear that the administrator might be appointed in this state. The existence of a cause of action which may be sued on in this state is sufficient showing of assets to give the Minnesota probate court jurisdiction to appoint an administrator to prosecute the action. *Morris v. Chicago, R. I. & Pac. Ry. Co.*

65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; Leonard v. Columbia Steam Nav. Co. 84 N. Y. 48, 38 Am. Rep. 491; Castigliano v. Great North. Ry. Co. 129 Minn. 279, 152 N. W. 413; Hutchins v. St. Paul, M. & M. Ry. Co. 44 Minn. 5, 46 N. W. 79; Brown's Admr. v. Louisville & N. Ry. Co. 97 Ky. 228, 30 S. W. 639.

3. The fact that another administrator has been appointed in another state and another action commenced there does not go to the jurisdiction of the probate court. It does not seem to us to have any decisive bearing on the case. There can be but one recovery.

Order affirmed.

CARBIC MANUFACTURING COMPANY v. WESTERN EXPRESS COMPANY.¹

July 15, 1921.

No. 22,348.

Carrier — interstate shipment — no waiver of notice of loss.

1. Where a carrier has filed a form of bill of lading for interstate shipments with the Interstate Commerce Commission and such form has been approved by the commission, a provision therein, to the effect that no claim for loss or damage can be enforced unless notice of such claim was given in writing within the time prescribed therein, cannot be waived by the carrier.

Oral notice not a compliance with requirement.

2. An oral notice that the shipment has been lost followed by a "tracer" sent out by the carrier in an attempt to locate it is not a compliance with such provision.

Action in the district court for St. Louis county to recover \$1,100 for the loss of 25 carbic lights by defendant. The answer alleged that under the terms of the bill of lading claims for loss must be made in writing to the originating or delivering carrier within four months and that no such claim having been made defendant was released from all

¹Reported in 184 N. W. 35.

liability of any sort. The case was tried before Dancer, J., who made findings and dismissed the action on the merits. From the judgment dismissing the action, plaintiff appealed. Affirmed.

Washburn, Bailey & Mitchell, for appellant.

Fryberger, Fulton, Hoshour & Ziesmer, for respondent.

TAYLOR, C.

Plaintiff appeals from a judgment for defendant. Plaintiff sued for the value of 25 carbic lights delivered to defendant at Duluth, Minnesota, to be transported to Dover, New Jersey, which were lost in transit and never delivered. The shipment was made under a bill of lading known as the uniform express receipt which provided that, as a condition precedent to recovery, claims for loss or damage "must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, within four months after a reasonable time for delivery has elapsed."

This form of receipt had been filed with, and approved by, the interstate commerce commission in connection with defendant's tariff rates.

Only two questions are presented: (1) Can defendant waive the provision of the contract which made the presentation of a claim in writing within the stipulated time a condition precedent to the right to maintain the action? (2) Has plaintiff complied with this provision in substance?

1. It is conceded that defendant, by its conduct, has waived the requirement in question if it had power to waive such a requirement.

The shipment was in interstate commerce. That interstate commerce is now governed exclusively by the Federal statutes and "by the common law principles accepted and enforced by the Federal courts" has become too thoroughly established to require the citation of authorities. Consequently we must look to, and follow, the decisions of the Federal courts insofar as they have determined the questions which arise in respect to such commerce.

The case of *A. J. Phillips Co. v. Grand Trunk W. Ry. Co.* 236 U. S. 662, 35 Sup. Ct. 444, 59 L. ed. 774, did not involve the precise question here presented, but the question whether a carrier could waive a provision of the statute limiting the time within which an action could be brought against it. The court said [p. 667]:

"To permit a railroad company to plead the statute of limitation as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here."

In *Georgia, F. & A. Ry. Co. v. Blish Milling Co.* 241 U. S. 190, 36 Sup. Ct. 541, 60 L. ed. 948, the milling company sued the terminal carrier for a quantity of flour damaged in transit and refused by the consignee. The carrier asserted as a defense that the milling company had failed to file a claim in writing within four months as required by the bill of lading. The court said [pp. 196, 197]:

"The provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms * * * The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." (Citing cases) "We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

The court held, however, that the requirement had been complied with in substance in that case.

St. Louis, I. M. & S. Ry. Co. v. Starbird, 243 U. S. 592, 37 Sup. Ct. 462, 61 L. ed. 917, was a suit for damages to a shipment of peaches in

which notice of the claim had not been given in writing within the stipulated time. The court, after considering prior cases and remarking that a notice in writing "puts in permanent form the evidence of an intention to claim damages" and enables the carrier to make such investigation as the case requires, said [p. 606]:

"We find nothing unreasonable in the stipulation concerning notice, and there was no attempt made to comply with it. We therefore think the Supreme Court of Arkansas erred in holding that verbal notice to the dockmaster of the condition of the peaches was a compliance with the terms of the contract."

In *Missouri, K. & T. Ry. Co. of Texas v. Ward*, 344 U. S. 383, 37 Sup. Ct. 617, 61 L. ed. 1213, the initial carrier issued a through bill of lading for a shipment of livestock. A connecting carrier, on receiving the shipment, issued a second bill of lading containing different terms, and sought to defend the action on the ground that the shipper had failed to comply with the terms of the second bill of lading. After holding that "the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation," and that the issuance of the second bill of lading was of no effect, the court said [p. 388]:

"The Railway Companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.* 241 U. S. 190, 197, 60 L. ed. 948, 952, the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act. * * * A different view would antagonize the plain policy of the act and open the door to the very abuses at which the Act was aimed."

Southern Pacific Co. v. Stewart, 248 U. S. 446, 39 Sup. Ct. 139, 63 L. ed. 350, was an action to recover damages for injuries to cattle in

which the shipper had failed to give a written notice within the prescribed time, but alleged and sought to prove that the carrier had waived this requirement. The trial court submitted the question of waiver to the jury which found in favor of the shipper. The court said [p. 449]:

"Considering the principles and conclusions approved by our opinions in *St. Louis, Iron Mountain & Southern Ry. Co. v. Starbird*, 243 U. S. 592, [61 L. ed. 917] and *Erie R. R. Co. v. Stone*, 244 U. S. 332, [61 L. ed. 1173] (announced since the judgment below) and the cases therein cited, no extended discussion is necessary to show that upon the facts here disclosed the stipulation between the parties as to notice in writing within ten days of any claim for damages was valid. And we also think those opinions make it clear that the circumstances relied upon by the shipper are inadequate to show a waiver by the carrier of written notice as required by the contract. The trial court erred in giving to the jury the instruction quoted above; and it should have granted the carrier's request for a directed verdict."

Baltimore & O. R. Co. v. Leach, 249 U. S. 217, 39 Sup. Ct. 254, 63 L. ed. 570, was an action for damages to cattle, in which the carrier alleged that the shipper had failed to serve a written notice of claim within the prescribed time. The court said [p. 218]:

"This averment was not denied; but the shipper replied that he promptly advised the railroad's agent at Georgetown of all essential facts and maintained that requirement in respect of written notice to general freight agent had been waived.

"The point involved has been discussed in our recent opinions and we can find nothing which takes this case out of the rule requiring compliance with a provision in a bill of lading like the one above quoted."

In *Texas & P. Ry. Co. v. Leatherwood*, 250 U. S. 478, 39 Sup. Ct. 517, 63 L. ed. 1096, the initial carrier issued a thorough bill of lading for a shipment of horses which contained a provision barring any action for damages unless brought within six months. Two of the connecting

carriers before accepting the shipment required the shipper to accept and sign new bills of lading. These bills of lading did not contain the above limitation. More than a year thereafter the shipper brought suit against the two carriers who had issued the new bills of lading for injuries to the horses while in transit. The carriers interposed as a defense that the action was barred by the stipulation in the original bill of lading. The court, after referring to the ruling in *Missouri, K. & T. R. Co. v. Ward*, *supra*, in respect to a second bill of lading said [p. 480]:

"We held that the second bill of lading was void, since under the Carmack Amendment the several carriers must be treated, not as independent contracting parties, but as one system; and that the connecting lines become in effect mere agents whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier, and that they are prevented by law from varying the terms of that contract. * * * As stated in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.* 241 U. S. 190, 197, [60 L. ed. 948, 952] the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper the right to ignore them. 'A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed.' The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled."

Erie Railway Co. v. Shuart, 250 U. S. 465, 39 Sup. Ct. 519, 63 L. ed. 1088, was a suit for injuries to a shipment of horses in which the shipper had failed to give a written notice as required by the contract. The court said [p. 467]:

"Under our former opinions, the clause requiring presentation of a

written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for."

In *Olson v. Chicago, B. & Q. R. Co.* 250 Fed. 372, 162 C.C.A. 442, the circuit court of appeals for this circuit has adopted and applied the same rule. And this rule was also recognized by the circuit court of appeals of the Ninth circuit in *Kidwell v. Oregon Short Line R. Co.* 208 Fed. 1, 125 C.C.A. 313.

We think the Federal Supreme Court has made it clear that a provision in the bill of lading requiring notice in writing within a stipulated time of claims for loss or damage, as a condition precedent to the right to enforce such claims, cannot be waived by the parties nor by any act or conduct of the carrier. Plaintiff urges that this rule should be applied only where the carrier offers the shipper an election between different rates which give him different rights, but, as we understand the Federal decisions, they do not limit the rule to such cases, but apply it in all cases.

The rule thus announced is not the rule heretofore followed by this court, as shown by *Banks v. Pennsylvania R. Co.* 111 Minn. 48, 126 N. W. 410; *Gamble-Robinson Co. v. Northern Pac. Ry. Co.* 119 Minn. 40, 137 N. W. 19; *Shama v. Chicago, M. & St. P. Ry. Co.* 128 Minn. 522, 151 N. W. 406, and other cases, but we feel constrained to adopt and follow it as the rule enforced by the Federal courts in respect to shipments in interstate commerce.

That the courts, generally, have taken this view of the meaning and effect of the Federal cases is shown by the numerous decisions which have adopted and applied the rule. The following are examples: *Metz Co. v. Boston & M. R.* 227 Mass. 307, 116 N. E. 475; *Houston E. & W. T. Ry. Co. v. Houston Packing Co.* (Tex. Civ. App.) 203 S. W. 1140; *Missouri, K. & T. Ry. Co. v. Lynn*, 62 Okl. 17, 161 Pac. 1050; *Wall v. Northern Pac. Ry. Co.* 53 Mont. 81, 161 Pac. 518; *Louisville & N. Ry. Co. v. Johnson*, 182 Ky. 418, 206 S. W. 638; *Abell v. Atchison, T. & S. F. Ry. Co.* 100 Kan. 238, 164 Pac. 269, L.R.A. 1918E, 782; *Dean v. Southern Ry. Co.* 107 S. C. 25, 91 S. E. 1042; *Bryan v. Louisville & N. R. Co.* 174 N. C. 177, 93 S. E. 750, L.R.A. 1918A, 938; *Southern Ry. Co. v. Lewis & Adcock Co.* 139 Tenn. 37, 201 S. W.

131, L.R.A. 1918C, 976; Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co. 198 Mo. App. 520, 201 S. W. 623.

2. Plaintiff contends, but apparently without any great degree of confidence, that it had complied with the requirement of the contract in substance. This contention rests on the fact that a little less than five months after making the shipment plaintiff telephoned to defendant's office at Duluth that the shipment had been lost and requested that a "tracer" be sent out, and the further fact that defendant prepared a "tracer" describing the shipment and sent it to the connecting carrier to whom the shipment had been delivered, and also sent a copy of it to plaintiff. Conceding that the notice by telephone was within four months after a reasonable time for delivery, and also conceding that it was sufficient in substance, which is doubtful, it was oral only, and the cases above cited establish beyond question that an oral notice is not sufficient where the contract requires a notice in writing. Plaintiff urges that the tracer sent out by defendant was in writing and in connection with the oral notice should be given effect as a claim for the loss. This tracer was not made or presented by plaintiff, and did not purport to assert or acknowledge a claim for compensation on the part of anyone. It was made and sent out by the carrier in an attempt to locate the shipment, and cannot be construed as in substance a compliance with the requirement that a party claiming compensation for a loss must make a claim therefor in writing within the prescribed time. Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co. 198 Mo. App. 520, 201 S. W. 623.

Our conclusions accord with those of the learned trial court and its judgment is affirmed.

HENRY H. PETERS v. FERDINAND RUEBENHAGEN AND
OTHERS.¹

July 15, 1921.

No. 22,857.

Broker — when owner making sale is not liable for commission.

1. Where a real estate broker has no exclusive right of sale, the

¹Reported in 184 N. W. 16.

owner of the land is not precluded from the right of sale to any person who may present himself, and, in case sale is made before the broker presents a purchaser, is not liable to the broker for a commission on a sale subsequently made by him.

Verdict for plaintiff sustained by evidence.

2. The evidence sustains the verdict of the jury to the effect that the sale made by the broker was reported to the landowner prior to the sale by him and rejected without cause.

Action in the district court for Sibley county to recover \$715 broker's commission on the sale of land. The case was tried before Tift, J., who at the close of the testimony denied plaintiff's motion for a directed verdict, and a jury which returned a verdict for \$715. From an order denying their motion for a new trial, defendants appealed. Affirmed.

George A. & C. H. MacKenzie, for appellants.

T. Otto Streissguth and Mueller Streissguth, for respondent.

BROWN, C. J.

Action to recover a commission alleged to be due plaintiff for services rendered defendants in the sale of certain land owned and held by them for sale. Plaintiff had a verdict and defendants appealed from an order denying a new trial.

Defendants authorized plaintiff to procure a purchaser for their lands, agreeing to pay him a commission if successful. Of this the record presents no dispute. Plaintiff claims that he thereafter found and presented to defendants a purchaser ready, able and willing to buy the lands on terms named by defendants; that defendants refused to accept him and immediately thereafter sold the land to a third person for the sum of \$41,715. Plaintiff further claims that for his services in the matter he was to receive all the land sold for over and above \$41,000, the selling price named by defendants to plaintiff, and that, since defendants wrongfully rejected the purchaser presented by him and sold the land to the third person for \$715 above the named purchase price, plaintiff is entitled to recover that amount.

Defendants conceded the authority of plaintiff to effect a sale of the land, and that if successful he would be entitled to compensation for his services. But they urged in defense that he had no exclusive right

of sale, and that, by the authority given him, they were not precluded from selling the land should a purchaser come to them and offer to buy the same. They further claim that a purchaser did present himself, and that defendants sold the land to him before plaintiff reported the sale to the person he subsequently presented as a purchaser. In response to this, plaintiff replied that the purchaser found by him was presented to defendants before the sale to the third person, and even before the initiation of negotiations looking to such sale. On this feature of the case there was a sharp conflict in the evidence.

The questions presented do not require extended discussion. The principal point involved ranges around the question whether plaintiff presented the purchaser procured by him before defendants made the sale to the third person. There was in fact no exclusive right of sale in plaintiff, and defendants were at liberty to make a sale to any one who might come forward with an offer to buy. 1 Dunnell, Minn. Dig. § 1141. But if plaintiff presented his purchaser before a sale was made by them, as he claims, he is entitled to the compensation agreed upon. Of this no controversy arises; the point is not disputed. The question then as to the time plaintiff presented his purchaser, whether before or after the sale by defendants, became the pivotal issue on the trial. It was submitted to the jury under clear instructions and was answered in plaintiff's favor. The evidence on the point is conflicting. If that offered by plaintiff expressed the truth, a question for the jury, plaintiff's right of recovery is clear. Our examination of the record presents no reason for disapproving the verdict of the jury and it must stand.

The further contention of defendants that plaintiff was not entitled to the excess over \$41,000, for which the sale was made, but to something less, measured by the acreage of the land, is not sustained by the record; at least the evidence made the question of the amount of plaintiff's compensation one of fact for the jury.

Order affirmed.

ELSWORTH A. NEEDLES AND ANOTHER v. WILLIAM M.
KEYS AND ANOTHER.¹

July 15, 1921.

No. 22,365.

**Vendor and purchaser — statutory notice to cancel contract — payment
of deferred instalments.**

The vendee made a default which, by the terms of the contract, authorized the vendor to declare the deferred instalments due immediately and to cancel the contract. After declaring the deferred instalments due immediately, the vendor instituted the statutory proceeding to cancel the contract. The vendee complied with the conditions in which he had made default within the statutory time, but did not pay the deferred instalments. *Held* that the payment of the deferred instalments could not be required in the statutory proceeding, and that the removal of the default which authorized its cancellation reinstated the contract.

Action in the district court for Ramsey county to construe a contract and to determine the rights of the parties under it and for other relief. The case was tried before Brill, J., who made findings and as conclusions of law found that the tender made to defendants on December 14, 1920, was sufficient to prevent the forfeiture of plaintiff's rights; the rights of plaintiffs under the contract were not terminated and defendants had not the right to the possession of the property in dispute. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

Cowern & Jesmer and Stephen I. Schmitt, for appellants.

Douglas, Kennedy & Kennedy, for respondents.

TAYLOR, C.

In January, 1918, defendants entered into a contract with the owner for the purchase of certain improved real estate in the city of St. Paul,

¹Reported in 184 N. W. 33.

by the terms of which, in addition to the initial payment, defendants assumed and agreed to pay two mortgages on the property aggregating the sum of \$10,000 and bearing interest at the rate of 6 per centum per annum payable semi-annually, and agreed to pay the taxes on the property before they became delinquent, and agreed to pay the owner the further sum of \$11,000 in semi-annual instalments of \$750 each. On November 20, 1919, defendants entered into a contract with plaintiffs, by which they sold and agreed to convey the property to plaintiffs, and by which plaintiffs, in addition to the initial payment, assumed and agreed to perform all of defendants' remaining obligations under their contract with the owner, and agreed to pay defendants the further sum of \$6,000 in monthly instalments of \$50 each, together with interest thereon at the rate of 6 per centum per annum. While this contract included a small strip of ground not included in the first contract, that fact is of no importance in this action.

The contract provided that, if plaintiffs failed to make any of the payments which they were required to make by the terms of the contract, then defendants at their election could declare "the whole of said payments" immediately due and payable, and that the contract should, at the option of defendants, "be forfeited, canceled and terminated" by giving to plaintiffs "thirty days written notice of such cancelation and termination, said notice to be in accordance with the statute in such case made and provided." On November 12, 1920, defendants served on plaintiffs a notice that plaintiffs were in default in failing to pay the instalment of \$50 due defendants on October 20, 1920; in failing to pay interest on the mortgages at the time it fell due; in failing to pay the last half of the 1919 taxes before they became delinquent, and in failing to pay improvement assessments against the property, and stating that, on account of such defaults, defendants had elected to, and did, declare the entire balance of the purchase price going to them, amounting to the sum of \$5,000 and interest thereon, immediately due and payable, and directing plaintiffs to pay the whole thereof at once to defendants or their attorneys. On November 15, 1920, defendants served on plaintiffs a notice specifying the conditions in which plaintiffs had made default, and stating that the contract would "termin-

ate within thirty days after the service of this notice," unless plaintiffs complied with the conditions of the contract prior thereto.

Within the 30 days, plaintiffs made all the payments required to be made by the contract other than those payable to defendants, and also tendered to defendants all past due instalments payable to them, together with interest thereon and the cost of serving the notice, but did not tender the principal sum of \$5,000 which defendants had declared to be due. Defendants refused to accept the tender, for the reason that it did not include this principal sum of \$5,000. The question presented is whether plaintiffs were required to pay this principal sum, being the amount of the deferred instalments, in order to relieve themselves from their default, it being conceded that they had complied with all other requirements within the prescribed time.

The statute provides:

"When default is made in the conditions of any contract for the conveyance of real estate or any interest therein, whereby the vendor has a right to terminate the same, he may do so by serving upon the purchaser * * * a notice specifying the conditions in which default has been made, and stating that such contract will terminate thirty days after the service of such notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provisions in the contract to the contrary * * * If within the time mentioned the person served complies with such conditions and pays the costs of service, the contract shall be thereby reinstated, but otherwise shall terminate." G. S. 1913, § 8081.

This statute takes away from the vendor the power to cancel the contract arbitrarily for the default of the vendee. It prescribes the only way in which the vendor may, by his own act, terminate the contract and thereby forfeit the rights of the vendee thereunder. The proceeding is in the nature of a strict foreclosure. While the statute must be given full effect, its provisions must be construed in the light of the legislative purpose to afford the vendee an opportunity to save and reinstate his equitable rights by removing the default, and, if the meaning be doubtful, that construction must be adopted which militates against a forfeiture. *Hage v. Benner*, 111 Minn. 365, 127 N. W. 3.

The statute provides that "when default is made in the conditions of any contract * * * whereby the vendor has a right to terminate the same," he may serve a notice specifying *the conditions in which default has been made*, and stating that the contract will terminate 30 days thereafter, unless prior thereto the vendee shall comply with *such conditions* and pay the costs of service. It further provides that if the vendee complies with *such conditions* within the prescribed time and pays the costs of service, "the contract shall thereby be reinstated." These provisions are to be strictly construed for the purpose of avoiding a forfeiture. It is clear therefrom that the vendee may reinstate the contract by performing only those conditions, the nonperformance of which gave the vendor the right to institute the proceeding.

The default which gave this right in the present case was the failure to make certain payments on the due dates fixed in the contract. Without this breach of the conditions of the contract, the vendor would have had no power to terminate it, and the statute gave the vendee the right to reinstate it by making these payments and reimbursing the vendor for the costs incurred. It is true that this same default gave the vendor power to declare the principal sum due, and he could doubtless have enforced his claim for such principal sum in a proper proceeding. He had the right to elect whether to proceed in court or under the statute. He elected to proceed under the statute for a strict foreclosure by his own act, and must, therefore, permit the vendee to cure his default on the terms and in the manner specified in the statute.

Conceding that the vendor had the right to declare the deferred instalments due and to enforce payment of them in a proper proceeding, we are unable to hold that in this proceeding he could make the payment of such deferred instalments one of the conditions with which the vendee must comply in order to reinstate the contract. We think the legislature did not intend to permit him, by his own act, to add to the conditions which the vendee must perform to cure his default and save his equitable rights. We think that the legislature intended that the contract should not be forfeited if, within the prescribed time, the vendee removed such defaults as were made grounds of forfeiture by the terms of the contract itself. And we hold that in proceedings under this statute, the vendor cannot, by exercising an option to declare de-

ferred instalments due immediately, require the vendee to pay such deferred instalments or forfeit his contract.

We agree with the trial court that the payments and tender made by the plaintiffs preserved and reinstated their rights under the contract, and the judgment appealed from is affirmed.

LUCILLE BURKE v. M. L. MARYLAND.¹

July 15, 1921.

No. 22,374.

Limitation of action for malpractice.

The complaint states a cause of action for malpractice. Such actions are not barred by the two-year statute of limitations which applies to actions for an assault, although some of the acts alleged may constitute an assault in law.

Action in the district court for Rice county to recover \$50,000 for malpractice. Defendant's demurrer to the complaint was overruled, Childress, J. From the order overruling the demurrer, defendant appealed. Affirmed.

John W. LeCrone and C. D. O'Brien, for appellant.

Orr, Stark & Kidder, for respondent.

TAYLOR, C.

Plaintiff brought this action to recover damages from defendant, a physician and surgeon, for alleged malpractice in the performance of a surgical operation upon her and in treating her for her ailments. Defendant demurred to the complaint on the ground that the cause, or causes, of action set forth therein accrued more than two years before the beginning of the action and are barred by the statute of limitations. The demurrer was overruled and defendant appealed.

Defendant construes the complaint as stating two causes of action—the first for an assault, and the second also for an assault, if it states

¹Reported in 184 N. W. 32.

a cause of action at all—and insists that both are barred by the statute of limitations which bars actions for assault, unless brought within two years after the right of action accrued.

We are unable to sustain defendant's contention. Fairly construed, we think the complaint states only one cause of action—a cause of action for alleged malpractice. It sets forth the facts in much detail, covering eight printed pages, and while some of the acts alleged would doubtless constitute an assault in law, they are not set forth as independent causes of action, but as being the acts wherein and whereby defendant is alleged to have violated his duty to his patient.

The action as brought rests on the contract of employment. *Whittaker v. Collins*, 34 Minn. 229, 25 N. W. 632, 57 Am. Rep. 55. And the six-year, not the two-year, limitation is the one which applies. *Finch v. Bursheim*, 122 Minn. 152, 142 N. W. 143.

The order appealed from is affirmed.

MANNHEIMER BROTHERS v. THE KANSAS CASUALTY &
SURETY COMPANY.¹

July 15, 1921.

No. 22,395.

Indemnity insurance — amount of liability — attorney's bill — court costs.

Defendant issued its policy of indemnity insurance thereby agreeing to indemnify and protect plaintiff, within the limits therein stated, from loss on account of injuries caused to third persons from the operation of its auto-truck, and further, to defend all actions brought against plaintiff to recover for such injuries. It is held:

(1) That the refusal of the insurance company to conduct the defense of an action so brought does not expose it to greater liability to the insured for injuries to the persons complaining than the amount stated in the policy.

(2) The measure of liability for a breach of the contract in that respect is: 1. The amount stated as for injuries to third persons; and

¹Reported in 184 N. W. 189.

2, all necessary costs and expenses incurred by the insured in defending the action.

(3) The insurance company is not entitled to a reduction of its liability for such cost and expense in proportion as its maximum liability bears to the amount so claimed by the injured party.

(4) The contract to defend is indivisible and extends to the whole case, regardless of the amount involved or whether it exceeds or does not exceed the liability of the insurance company.

(5) Counsel for defendant, who was employed to defend the action following the refusal of defendant to do so, at the conclusion of the litigation presented a bill for his services which plaintiff acquiesced in and paid. There being no suggestion of fraud or collusion, or basis to justify an inference of an exorbitant charge, the presentation and payment of the bill is *held* sufficient evidence of reasonable value to justify the allowance thereof as an item incurred in the defense of the action. The rule applied in *Mitchell v. Davies*, 51 Minn, 168, should not be extended to include a showing of that kind.

(6) The findings of the trial court that defendant repudiated its liability and refused to defend the action are sustained by the evidence.

Action in the district court for Ramsey county to recover \$14,484.27. The case was tried before Dickson, J., who made findings and ordered judgment in favor of plaintiff for \$7,301.92. From the judgment entered pursuant to the order for judgment both parties appealed. Affirmed on both appeals.

C. D. & R. D. O'Brien, for appellant.

Dille, Hoke, Krause & Faegre and *R. F. Merriam*, for respondent.

BROWN, C. J.

The facts in this case are not in dispute in any substantial respect. Defendant in due course issued to plaintiff its insurance policy, thereby agreeing for the consideration paid to indemnify plaintiff for any loss or injury occasioned to third persons from the operation of plaintiff's auto delivery truck in the city of St. Paul. There was subsequently a collision between the truck and an automobile in which one Hillstrom and one Hanscom were riding, resulting in serious injury to both. They thereafter brought separate suits against plaintiff, charging in their complaints as the basis of the actions that the collision was caused by the negligence of the operator of the truck, the servant and

employe of plaintiff. Though the insurance policy obligated defendant to defend these actions on behalf of plaintiff, defendant therein, the company refused to do so, on the ground that, by reason of certain facts not necessary here to repeat, it was not liable on the policy. Plaintiff then employed counsel who conducted the defense throughout the litigation. The trial of the actions resulted in a judgment for Hillstrom in the sum of \$12,633.62, and for Hanscom in the sum of \$2,630.73. There was an appeal in the Hillstrom case and an affirmance in this court, 146 Minn. 202, 178 N. W. 881. Plaintiff then brought an action against defendant to recover on the policy the amount paid on the Hanscom judgment, and the costs incurred in defending that action, and recovered a default judgment which was affirmed on appeal, *Mannheimer Bros. v. Kansas C. & S. Co.* 147 Minn. 350, 180 N. W. 229, wherein defendant's claim of nonliability was held without merit. Plaintiff paid the Hillstrom judgment, and then brought this action to recover on the policy, demanding therein the full amount of the Hillstrom judgment, and the cost and expense of defending the action through the courts, including an attorney's fee of \$1,500. Defendant in effect admitted liability; it could not well do otherwise, for the question was ruled adversely to it in the Hanscom action. But defendant claimed that it was not liable for the full amount of the judgment, since the policy limited its liability to \$5,000, and demanded that plaintiff's recovery be confined to that amount. Defendant also demanded that the costs incurred by plaintiff on the appeal in the Hillstrom case be apportioned between the parties in accordance with their separate interests therein.

The action was tried without a jury, at the conclusion of which the court gave judgment for plaintiff for the sum of \$5,000 (the amount fixed by the policy), and all the costs incurred by plaintiff in defending the former action, including an attorney's fee of \$1,500. The items of costs were \$42.85, incurred in the district court, and \$410.11, incurred on the appeal to this court. Judgment was entered accordingly and both parties appealed.

1. Defendant's appeal challenges the allowance of the full amount of the supreme court costs, and the sum of \$1,500 as attorney's fees. The objection to the supreme court costs is that defendant's liability on the policy does not exceed \$5,000, and that since the judgment in the

Hillstrom case, from which the appeal was taken, was \$12,633, defendant should be charged with the costs of the appeal only to the extent and in proportion that its liability bears to the whole amount, namely, five-twelfths. In our view of the contract this contention was properly rejected by the trial court. The insurance contract obligated defendant to defend all actions brought against plaintiff, on claims for damages resulting from the operation of the insured truck, and we find no qualification limiting its obligation in that respect to the extent of its own interests in the litigation. The duty created by the contract was to conduct the whole defense, and if necessary to vindicate the rights of the insured, to prosecute an appeal to the supreme court. The undertaking is indivisible, and the failure to respond thereto also indivisible, exposing defendant to all necessary costs which plaintiff incurred in doing that which defendant had undertaken but refused to do.

2. The objections to the attorney's fee allowance are: (1) That defendant offered to perform its duty in the premises and defend the action, but its offer was rejected, thus exonerating it from further responsibility in the matter; and (2) that the record contains no evidence of the value of the services of the attorney plaintiff employed, and therefore, under the rule applied in *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363, cannot be recovered. Neither objection is sustained. As to the first it need only be said that the trial court found as a fact that defendant repudiated its liability on the policy and refused to defend the action. The evidence is ample to sustain the finding, at least it is not so clearly against the evidence as to justify interference by this court. As to the second objection, it appears that, after defendant had declined to conduct the defense to the action, plaintiff employed an attorney of prominence and high standing who took charge of the litigation and conducted it with ability to a final conclusion. He subsequently presented his bill for \$1,500, which plaintiff paid without question. There was no direct evidence that the services were in fact of that value. But we think, and so hold, that the fact that the charge was made and promptly acquiesced in and paid by the client, is some evidence that the amount was reasonable, and, in the absence of fraud or collusion, sufficient upon which to base a finding of reasonableness. The

case of *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363, should not be extended to facts like those here presented.

3. The question presented by plaintiff's appeal is whether the extent of the liability of defendant is that named and fixed by the contract, or whether, since defendant breached the contract, repudiating liability and refusing to defend the action as required by the policy, the limitations of the contract disappear, rendering defendant liable for the full amount of plaintiff's loss. We answer the question adversely to plaintiff's contention that the liability is general and to the full amount of the *Hillstrom* judgment. The terms of the policy pertinent to the subject are as follows:

"The company's liability under paragraph one of the insuring agreements, on account of bodily injuries to or death of one person is limited to five thousand dollars (\$5,000) and subject to the same limit for each person, the company's total liability on account of bodily injuries to or the death of more than one person as the result of one accident is limited to ten thousand dollars (\$10,000).

The policy was for \$10,000, with a limitation of \$5,000 for injury or damage to any one person, and a total liability not greater than \$10,000 to more than one person injured in the same accident. Both *Hillstrom* and *Hanscom* were injured in the one accident, and the terms of the policy quoted apply to the case. This limitation is unambiguous and free from doubt and cannot be added to without making a new contract for the parties. The question presented is controlled by the general rule that the measure of damages for the breach of a contract for the payment of money is the amount agreed to be paid with interest. The fact in this case that defendant's obligations under the contract extended beyond the payment of the amounts stated and included the promise to conduct the defense of the action, cannot be held to enlarge the limitation as to the amount fixed as reimbursement for injuries to persons. The failure to defend exposed defendant only to the additional liability for the cost and expense which plaintiff was put to by reason of defendant's breach of the contract in that respect. That breach clearly did not create any greater liability on the facts

here disclosed. The authorities cited by plaintiff are not in point. None thereof involved the precise question here presented, and our research has brought to light no adjudications sustaining plaintiff's contention. What the situation would be, for illustration, in a case where the insurer failed to take an appeal in an action which it was under obligation to defend, upon a showing that a reversal and complete exoneration of the insured would have followed, we do not consider. Such is not the case at bar. An appeal was taken by plaintiff, resulting adversely, and the only extra damages suffered in consequence of defendant's neglect was the cost thereof, which plaintiff here recovers.

It follows therefore that the liability of defendant under the terms of the contract above quoted is limited to \$5,000, for each person injured, and the trial court was right in so holding. This disposes of plaintiff's further point that, since in the Hanscom case the full \$5,000 was not used in paying his claim, plaintiff may claim the balance up to the full amount of the insurance of \$10,000. To grant that contention would also amount to a judicial remodeling of the contract.

This disposes of the case and all points involved, and finding no error the judgment appealed from is affirmed on both appeals.

P. A. McCRAV AND ANOTHER v. SAM J. BUTTELL AND ANOTHER.¹

July 15, 1921.

No. 22,407.

Specific performance — complaint good.

1. The complaint stated a cause of action for specific performance.

Part owner, who without authority contracts for the other owners, may be compelled to convey his interest.

2. Where the vendor, for himself and as agent for the other part owners, contracts to convey the entire property, but in fact lacked

¹Reported in 184 N. W. 191.

authority to execute the contract on behalf of the other part owners, the vendee may require him to perform the contract to the extent of conveying his own interest in the property on receiving a proportionate part of the purchase price, unless it be shown that the lack of authority in the vendor was known to the vendee when he executed the contract.

Findings supported by evidence.

3. The evidence sustains the finding that defendant executed the contract on behalf of all the owners, and the finding that plaintiffs had no knowledge of his lack of authority to do so.

Estoppel against defendant.

4. Defendant cannot take advantage of special instructions given to his agent which were not communicated to plaintiffs.

Action in the district court for Stevens county for specific performance of a contract and to recover \$10,000. The case was tried before Flaherty, J., who made findings as stated on page 490, *infra*, and directed judgment as stated on the same page. From an order denying his motion to amend the findings and conclusions or for a new trial, Samuel J. Buttell appealed. Affirmed.

Neil M. Cronin, for appellant.

James^{}B. Ormond*, for respondents.

TAYLOR, C.

William Buttell and Samuel J. Buttell were brothers and were the owners as tenants in common of a farm of 320 acres in Stevens county. William Buttell died intestate in November, 1918, and his interest in the farm passed to and vested in his widow and three minor children. They removed to the state of Nebraska. Samuel continued to operate the farm and was appointed administrator of William's estate. He desired to sell the farm and had a conversation with his brother's widow in which she told him to list it for sale. They seem to have had no understanding or agreement concerning either price or terms. On May 3, 1919, Samuel listed the farm for sale with Joseph J. Gaffney, a real estate agent residing at Morris, the county seat. Gaffney negotiated a sale to plaintiffs, and prepared a contract, dated June 7, 1919, in which "Samuel J. Buttell, a single man, * * * —Buttell, widow of William Buttell, and Samuel J. Buttell as agent for the heirs of

William Buttell, deceased," were named as parties of the first part, and the plaintiffs were named as parties of the second part, and by which the parties of the first part sold and agreed to convey the farm "unto said parties of the second part, or their assigns, by deed of warranty, upon the prompt and full performance of said parties of the second part of their part of this agreement."

The contract fixed the purchase price at the sum of \$37,120, being at the rate of \$116 per acre. The farm was encumbered by a mortgage for \$16,000. The purchasers were to assume this mortgage, and were to pay \$2,000 at the execution of the contract and \$4,000 on or before March 1, 1920. When the payment of \$4,000 was made, the parties of the first part were to execute and deliver a warranty deed of the property, and the purchasers were to execute a mortgage back in the sum of \$15,120 for the balance of the purchase price, the mortgage to be due on or before March 19, 1924, and to bear interest at the rate of 6 per centum per annum from March 1, 1920. The contract was prepared in triplicate. The plaintiffs executed the three copies on June 7, 1919, and at the same time delivered to Gaffney their checks for the sum of \$2,000, the amount of the initial payment. Thereafter, and on the same day, the defendant executed the three copies personally, and also as agent for the heirs of William Buttell. Thereupon Gaffney delivered to him two copies of the contract and the checks for the initial payment, and subsequently delivered the other copy of the contract to the plaintiffs. Defendant sent the two copies of the contract, which he received, to William's widow for her signature. He cashed the checks for the initial payment and deposited \$1,000 thereof to the credit of his own bank account and \$1,000 thereof to the credit of the bank account of William's estate. He gave Gaffney two checks of \$320 each—one drawn on his own bank account, and the other drawn by him as administrator on the bank account of William's estate—to apply on Gaffney's commission for making the sale. William's widow returned the two copies of the contract forwarded to her without her signature and refused to agree to the sale. Defendant took the matter up with Gaffney on the theory that she might consent to the sale, if the payment of March 1, 1920, was substantially increased and Gaffney induced plaintiffs to agree to increase the amount of that payment to the sum of

\$10,000, but she also rejected this proposition. Thereafter defendant informed plaintiffs that he was unable to carry out the contract and tendered back the initial payment of \$2,000 which they refused to accept. On March 1, 1920, plaintiffs tendered to defendant the sum of \$4,000, the amount of the payment due on that date, and demanded a deed. Defendant refused to receive the money or execute a deed, and plaintiffs brought this action for specific performance of the contract.

The court found, in substance, among other things, that defendant executed the contract "individually and as agent for the heirs of William Buttell;" that he had refused to carry out the contract in any manner; "that plaintiffs have duly performed all the conditions of said contract on their part to be performed up to the making of the March 1, 1920, payment which they have duly tendered, and are ready, willing and able to carry out and perform their part of said agreement;" that defendant had no authority to execute the contract on behalf of the heirs of William Buttell, deceased, of which fact plaintiffs had no notice or knowledge, and that, at the trial, plaintiffs had expressed a desire to take the interest of defendant in the property with an abatement of the purchase price, if they could not obtain the entire property.

The court directed judgment to the effect that upon the payment by plaintiffs of one-half the amount of the cash payments specified in the contract and the execution by them of a mortgage in accordance with the terms of the contract for one-half the amount of the deferred payment, defendant should be required to perform the contract to the extent of conveying his undivided one-half interest in the property by warranty deed, subject to the encumbrances against the property, and with a provision in the deed by which plaintiffs assumed one-half of such encumbrances. The order also contained proper provisions in respect to interest, in respect to the application of the payment already made, and in respect to other matters not necessary to mention. Defendant made a motion for amended findings or for a new trial and appealed from the order denying it.

1. At the trial defendant objected to the admission of any evidence under the complaint on the ground that it failed to state a cause of action, and urges that the court erred in overruling this objection.

"Upon such an objection every reasonable intendment will be indulged in favor of the sufficiency of the complaint * * * The objection will be overruled if the complaint can be sustained by the most liberal construction." 2 Dunnell, Minn. Dig. § 7687.

Giving the complaint the liberal construction required by the rule under such circumstances, we think it stated a cause of action for specific performance, and we fail to see wherein any incompleteness in its statements resulted to the prejudice of defendant.

The complaint alleged that plaintiffs had duly performed all the conditions of the contract on their part. It further alleged that they had tendered payment of the \$4,000 on March 1, 1920, and that they were still ready and willing to pay the purchase price on receiving a full warranty deed. Defendant argues that the general allegation of performance by plaintiffs is limited by the specific allegation that they had tendered payment of the \$4,000 instalment, and that it cannot be assumed that they had executed, or offered to execute, the mortgage for the deferred instalment, or had assumed, or offered to assume, the existing mortgage. Conceding without deciding, that this contention is correct, the allegations were, nevertheless, sufficient under long established rules. *Lewis v. Prendergast*, 39 Minn. 301, 39 N. W. 802; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Chisholm*, 55 Minn. 374, 57 N. W. 63; *Blunt v. Egeland*, 104 Minn. 351, 116 N. W. 653; *Murray v. Nickerson*, 90 Minn. 197, 95 N. W. 898. The tender of the instalment of \$4,000 was all that plaintiffs were required to do before the execution of the deed, and the complaint shows sufficiently that they were ready to perform on their part.

2. Defendant contends that "where the vendee knew, at the time of entering into the contract, of the vendor's incapacity to give him the entire estate, he cannot have specific performance as to the vendor's interest with abatement of the price," and cites numerous authorities in support of this proposition.

It is doubtless the general rule that, where the vendee enters into the contract, knowing that there is a portion of the property, or an interest therein, which the vendor can neither convey nor cause to be conveyed, he cannot compel a conveyance of so much of the property as the vendor is able to convey with an abatement of the purchase price for

the deficiency, and that, if he elects to enforce specific performance under such circumstances, he must pay the full purchase price and rely upon the covenants in his deed for reimbursement for any loss resulting from defects in his title. But where the vendor contracts on his own behalf in respect to his interest in the property and on behalf of the other part owners in respect to their interests therein, and is thereafter unable to convey the entire property, or cause it to be conveyed, for the reason that he lacked the power to bind such other part owners, the vendee may require him to convey his own interest in the property on receiving a proportionate part of the purchase price, unless it be shown that the vendee made the contract with knowledge that the vendor was not authorized to act for such other part owners. *Melin v. Woolley*, 103 Minn. 498, 115 N. W. 654, 946, 22 L.R.A.(N.S.) 595. The authorities are considered and the rules which govern in such situations are pointed out in that case.

In the present case defendant contracted on his own behalf and as agent for the heirs of William. He in fact acted without authority in making the contract as agent for the heirs of William, but the court found that plaintiffs had no notice or knowledge that he lacked such authority. We think the evidence is ample to sustain this finding and that the case falls within the rule applied in the *Melin* case.

Defendant insists that, in order to bring the case within this rule, it must appear that he represented that he possessed the authority which he assumed to exercise; that it is conceded that he never met plaintiffs nor had any correspondence with them until after the contract had been repudiated by William's widow; and that consequently he could have made no representations to them. We think that his execution of the contract as agent for the heirs of William was a sufficient representation that he had authority to act for them. No claim is made that plaintiffs had any knowledge as to William's heirs or as to defendant's right to represent them, except such as was given by the contract itself. The contract, without giving her first name, designated the widow of William as one of the parties of the first part,

and defendant urges that this fact and the fact that the contract was not signed by her was notice to plaintiffs that it was incomplete and brings the case within the rule applied in *Stub v. Grimes*, 38 Minn. 317, 37 N. W. 444. She was one of the heirs of William under the statute. When the contract was delivered to plaintiffs it had been executed by defendant as agent for all these heirs and purported to be complete, and we think that naming the widow as a party to the contract, in the recitals therein, was not sufficient to require the court to find that plaintiffs were chargeable with notice that defendant lacked authority to act for her.

3. Defendant also questions the authority of Gaffney to deliver the contract to plaintiffs. Defendant took two copies of the contract executed by plaintiffs and took the checks for the initial payment and cashed them. He could hardly expect to receive this money and an obligation binding plaintiffs without giving them an obligation binding him. Moreover Gaffney was his agent, and, if there was any understanding between them that the contract was not to be delivered to plaintiffs until it had been signed by the widow of William, and the weight of evidence is to the contrary, there is no claim that plaintiffs had any knowledge of such understanding.

We are convinced that the trial court disposed of the case correctly and the order appealed from is affirmed.

RONALD J. MacLEOD AND ANOTHER, COPARTNERS AS
MacLEOD & SMITH v. BARTON J. PAYNE SUBSTITUTED
FOR THE DULUTH & IRON RANGE RAILROAD
COMPANY AND ANOTHER.¹

May 6, 1921.

No. 22,190.

Railway — accident at crossing — charge to jury.

Held: (1) There was no error in refusing to give plaintiffs' requests to the jury, separately, and in including in the general charge all the points covered by them.

¹Reported in 182 N. W. 718.

(2) In submitting to the jury the question whether the absence of a flagman, gates or a gong at a particular grade crossing, constituted negligence on defendant's part, in the absence of any express provision requiring either of them, it is not prejudicial to defendant for the court to state the absence of express law on the subject. [Reporter.]

Action in the district court for St. Louis county to recover \$4,800 damages to plaintiffs' motor truck caused by the negligent operation of defendant's passenger train. The answer alleged negligence on the part of the driver of the truck. The case was tried before Dancer, J., who at the close of the testimony denied defendant's motion for a directed verdict, and a jury which returned a verdict in favor of defendant. From an order denying their motion for a new trial, plaintiffs appealed. Affirmed.

John Jenswold and John D. Jenswold, for appellants.

Abbott, MacPherran, Gilbert & Doan, for respondent.

PER CURIAM.

A collision between plaintiffs' automobile truck and a train of cars belonging to defendant at a grade crossing resulted disastrously to the truck, and plaintiffs brought this action for damages on the ground and claim that the accident was caused by the negligence of defendant. A verdict was returned for defendant, and plaintiffs appealed from an order denying a new trial.

The principal contention in support of the appeal is that the trial court erred in refusing certain of plaintiffs' requested instructions to the jury. We find no error in this respect. The action is in negligence and controlled by the rules and principles applicable to that branch of the law, thoroughly and well understood by the trial judge. The charge to the jury was quite long, yet clear, and fully stated all the rules applicable to the issues presented. The court pursued the course commended in *Davidson v. St. Paul, M. & M. Ry. Co.* 34 Minn. 51, 24 N. W. 324, refusing all special requests, except as included in the general charge. In this manner all the requests of plaintiffs were covered in what the court gave to the jury as the law of the case. We find nothing of substance omitted, and there was no error in not giving them separately. *Woxland v. N. W. Consolidated Milling Co.* 113 Minn. 440, 129 N. W. 856; 3 Dunnell, Minn. Dig. § 9778.

Nor do we find error in any other respect. There is no express provision of the law requiring the maintenance of a flagman, gates or a gong at the particular crossing, and none were placed there by defendant. But the court submitted to the jury the question whether their absence, though not required by positive law, constituted negligence on the part of defendant. In this connection the court stated the absence of express law on the subject, and counsel contend that the effect thereof was prejudicial to plaintiffs as a disparaging comment of the court. We are unable to take that view of the

matter. *Peterson v. Chicago, B. & Q. R. Co.* 131 Minn. 266, 154 N. W. 1093. There was no error in the admission of evidence, showing the character of the crossing and the extent of the traffic thereon. And finding no error the order appealed from will be and is affirmed.

FREDERICK G. BARWALD AS ADMINISTRATOR OF THE
ESTATE OF ARTHUR BARWALD, DECEASED v.
WILLIAM THUET.¹

May 6, 1921.

No. 22,284.

When appeal cannot be taken — order granting new trial.

An order granting a new trial which fails to state expressly that it is granted exclusively upon errors occurring at the trial, is not appealable. *Laws* 1913, p. 699, c. 474, amending *R. L.* 1905, § 4365, subd. 4. [Reporter.]

Action in the district court for Dodge county for an accounting and to recover \$154.50. The case was tried before Childress, J., who made findings and ordered judgment in favor of plaintiff for \$463.35. From an order granting plaintiff's motion for a new trial, defendant appealed. Appeal dismissed.

John J. Keefe, for appellant.

John Swendiman, Jr. and *J. J. McCaughey*, for respondent.

PER CURIAM.

This is an appeal from an order granting plaintiff's motion for a new trial.

By chapter 474, p. 699, *Laws* 1913, subd. 4, section 4365, *R. L.* 1905, was amended by the addition of these words:

"Provided that when an order granting a new trial is based exclusively upon errors occurring at the trial and it is so expressly stated in the order or memorandum of the trial court, an appeal therefrom may be taken, but in such case only."

In the case at bar there was a trial by the court without a jury. The plaintiff moved for amended findings, and, if denied, for a new trial on two grounds, newly discovered evidence and insufficiency of the evidence to jus-

¹Reported in 132 N. W. 719.

tify the court's decision. The motion to amend was denied, but a new trial granted. The court said in a memorandum that "the demands of justice require a new trial of this case," also that testimony of the defendant relating to conversations with plaintiff's intestate had been called out by cross-examination, notwithstanding his incompetency as a witness to give such testimony. The memorandum nowhere states that the order was based exclusively upon error in receiving this evidence or for errors occurring at the trial. It follows that the order is not appealable and that the appeal must be dismissed. *Kommerstad v. Great Northern Ry. Co.* 125 Minn. 297, 146 N. W. 975; *Heide v. Lyons*, 128 Minn. 488, 151 N. W. 139; *Montee v. Great Northern Ry. Co.* 129 Minn. 526, 151 N. W. 1101; *Greenberg v. National Council of K. & L. of S.* 132 Minn. 84, 155 N. W. 1053; *Pust v. Holtz*, 134 Minn. 266, 159 N. W. 564; *Schommer v. Elschens*, 148 Minn. 486, 182 N. W. 166.

Appeal dismissed.

CATHERINE FRANCES BURCHFIELD v. J. P. WEST.¹

May 20, 1921.

No. 22,219.

In action for personal injury — damages excessive.

Action for personal injury. Plaintiff, who was over 70 years of age when injured, had two ribs fractured, resulting in a puncture of the pleural cavity. Verdict for \$2,500. *Held*: Unless plaintiff consented to a reduction of the verdict to \$1,700, defendant was granted a new trial. [Reporter.]

Action in the district court for Hennepin county to recover \$15,000 for injuries received in a collision with an automobile. The answer was a general denial. The case was tried before Leary, J., and a jury which returned a verdict for \$2,500. From an order denying his motion for a new trial defendant appealed. Affirmed.

Milton D. Purdy and *Eugene C. Noyes*, for appellant.

J. D. Greathouse and *William A. Tautges*, for respondent.

PER CURIAM.

Plaintiff in a buggy and defendant in a Ford met on a country road. The rear wheel of the buggy caught on the fender of the car. Some part of the harness or buggy gave way, plaintiff was tipped out, and in the fall broke

¹Reported in 182 N. W. 954.

two ribs. She recovered a verdict for \$2,500. On this appeal defendant's counsel conceded that there is evidence supporting the verdict both as to defendant's negligence and plaintiff's freedom from contributory negligence, but with much earnestness it is contended that the damages awarded are excessive. The only injury discovered was the fracture of two ribs. This was very painful for several weeks, because one of the ribs fractured in such a way as to puncture the pleural cavity of the lung. However, her physicians say there has been a good recovery. To be sure, some adhesions in the pleural cavity are suspected which give some pain in expanding the lung, or in lifting or other exertion. This is the only permanent injury claimed by any of plaintiff's physicians. They do not contend that she will suffer constant pain or that she will not improve in that regard. Plaintiff was past 70 years of age when the accident happened. She has reached that age when great lifting and much exertion is not ordinarily done. We think the damages are too large for the injury sustained even when the present low purchasing power of money is taken into consideration. A new trial is therefore granted unless plaintiff within 20 days after the going down of the remittitur herein files her consent to the reduction of the verdict to the sum of \$1,700. Upon the filing of such consent in the court below no new trial will be had.

MINNIE MAE BENN, AS EXECUTRIX OF THE ESTATE OF
ROBERT J. BENN v. MINNESOTA COMMERCIAL
MEN'S ASSOCIATION.¹

May 27, 1921.

No. 22,211.

Process — service on insurance commissioner of foreign state valid.

Action on judgment obtained in Montana court against Minnesota corporation, begun by service of process on insurance commissioner in accordance with Montana statute. Defendant had never appointed an agent in Montana to receive service. Judgment held valid under authority of Wold against this defendant, 136 Minn. 380, 162 N. W. 461. Rule of Federal cases distinguished. [Reporter.]

Action in the district court for Hennepin county to recover \$6,545.90. The case was tried before Walte, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

¹Reported in 182 N. W. 999.

Rieke & Hamrum and Lancaster, Simpson, Junell & Dorsey and Robert Driscoll, for appellant.

Alphonse A. Tenner, Edward E. Tenner and T. H. MacDonald, for respondent.

PER CURIAM.

This case, in all substantial respects, is similar to the case of *Wold* against this same defendant reported 136 Minn. 380, 162 N. W. 461. That was an action on a judgment rendered by a Wisconsin court on a certificate of insurance issued by defendant to a resident of the state of Wisconsin. Defendant had never appointed an agent in Wisconsin to receive service of process and the service in the Wisconsin action was made on the insurance commissioner of that state as authorized by the statute of that state. Defendant contended that it did no business in Wisconsin and that the Wisconsin court acquired no jurisdiction over it by such service. We held that defendant was doing business in Wisconsin, that the Wisconsin court acquired jurisdiction by service on the insurance commissioner, and that its judgment was valid.

The present action is brought on a judgment rendered by a Montana court on a certificate of insurance issued by defendant to a resident of the state of Montana. Defendant has never appointed an agent in Montana to receive service of process, and the service was made on a state official as authorized by the Montana statute in such cases. Defendant contends that the Montana court acquired no jurisdiction by this service and that its judgment is void for that reason.

Defendant was doing business in Montana of the same nature and in the same manner as in Wisconsin. But defendant insists that the contract of insurance is a Minnesota contract, and that, in a suit on such a contract, the courts of Montana cannot acquire jurisdiction over it by service on a state official, whose only authority to accept such service is derived from a statute of Montana. In support of this contention it cites *Old Wayne Mut. Life Assn. v. McDonough*, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; *Simon v. Southern Ry. Co.* 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492, and other cases, and urges that the Federal cases are controlling and that the *Wold* case is not in accord with them. Even if the contract be a Minnesota contract, it had its inception in the Montana business and involves the rights of a citizen of Montana growing out of the business done in that state, and we think the case does not come within the rule applied in the Federal cases cited.

Our conclusion is that the *Wold* case should be followed until the Federal Supreme Court shall pronounce it erroneous.

Judgment affirmed.

NORTHLAND PINE COMPANY v. NORTHERN INSULATING
COMPANY AND OTHERS.

E. LUTHER MELIN, APPELLANT.

PATRICK J. GALLAGHER, PURCHASER.¹

June 3, 1921.

Nos. 22,144, 22,274, 22,275, 22,276.

Receiver's account and attorney's fees.

Questions concerning the allowance of a receiver's final account and fixing his fees and those of his attorney, rest largely in the discretion of the trial court. *Held*: That discretion was not abused. [Reporter.]

After the appeal reported in 145 Minn. 395, 177 N. W. 635, the matter of receiver's compensation and that of attorney's fees were submitted to Dickinson and Jelly, JJ., and fixed by them. From orders appointing a receiver, directing a sale of the property, allowing the receiver's final account, fixing his fees and those of his attorney, and refusing to vacate the order for the sale of the property and allowing the receiver's claim, Intervener Melin appealed. *Affirmed*.

E. Luther Melin, pro se.

Elijah Barton, A. B. Davelius and J. E. Tappan, for respondents.

PER CURIAM.

The intervener appeals from four separate orders made at different times by the district court of Hennepin county. The appeals are: (1) From an order appointing the receiver; (2) from an order directing a sale of the property in question; (3) from an order allowing the receiver's final account and fixing his fees and those of his attorney, and (4) from an order refusing to vacate the order for the sale of the property and allowing the receiver's claim.

The matters embraced in the first two appeals referred to were fully considered and finally disposed of in 145 Minn. 395, 177 N. W. 635. The matters involved in the third appeal rest largely in the discretion of the trial court. In *re State Bank, Insolvent*, 57 Minn. 361, 59 N. W. 315; *Olson v. State Bank*, 72 Minn. 320, 75 N. W. 378. The receivership extended over a period of about two years. Many motions and court hearings were had. There was a large amount of property to care for and it appears to have been in a very unusual condition. Many of the transactions were conducted

¹Reported in 183 N. W. 142.

under the direct supervision of the trial court and seem to have received close attention. The only new matters here for review relate to the allowance of the receiver's compensation and the attorney's fees. The claims were well itemized and are supplemented by affidavits and oral proofs. They were submitted to two of the judges of the district court, and, after some modification, allowed. The amount allowed was not such as to indicate an abuse of discretion, and we find no reason for disturbing the same.

With this view of that phase of the case it becomes unnecessary to discuss the fourth appeal, as it relates only to the validity of the other orders appealed from.

Affirmed.

RICHARD J. LEWIS v. A. M. LAWTON.¹

June 24, 1921.

No. 22,257.

Partnership in profits from sale of land — evidence sufficient to support verdict.

Action to recover a share of profits on a sale of land on the theory there was a partnership agreement in reference thereto. Jury was charged that if the parties agreed that the net profits of the sale should be divided, plaintiff was entitled to recover his share of them. Verdict for plaintiff. Appeal from denial of new trial on sole ground that verdict was not justified by the evidence. *Held*: There was evidence enough to support the verdict and the trial court properly refused to set it aside. [Reporter.]

Action in the district court for Ramsey county to recover \$666.67, one-third of the profits due plaintiff under a partnership agreement relating to a sale of land. The case was tried before Michael, J., and a jury which returned a verdict for \$679. From an order denying his motion for a new trial, defendant appealed. Affirmed.

Walter L. Chapin, for appellant.

Moore, Oppenheimer & Peterson, for respondent.

PER CURIAM.

Appeal from an order denying a new trial of an action to recover a share in the profits of a sale of land on the theory that there was a partnership

¹Reported in 183 N. W. 517.

agreement relating to such sale. The trial was by jury and the verdict in plaintiff's favor.

The sole ground upon which defendant seeks a reversal is that the verdict was not justified by the evidence. The case was submitted to the jury under an instruction that, if the parties agreed that the land should be purchased or handled by them as a partnership venture and the net profits resulting from a sale of the land should be divided, plaintiff was entitled to recover his share of the profits. No question was raised as to the propriety of the instruction. The evidence that the land was purchased by plaintiff and defendant as a partnership venture was weak and unsatisfactory. If plaintiff's right to recover depended entirely upon the sufficiency of the evidence to support a finding that it was so purchased, we might hesitate to affirm the order, but there was clearly evidence enough to warrant the jury in finding that in securing a purchaser for and effecting a sale of the land, the parties acted under their agreement that net profits realized as the result of sales accomplished by their joint efforts should be treated as partnership earnings. It follows that the trial court was right in refusing to set aside the verdict.

Judgment affirmed.

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ACCOMPLICE.

Corroborating Testimony. See Criminal Law, 11, 15.

ADOPTION.

1. The mere fact that a mother is so destitute that she cannot adequately provide for the needs of her child and that someone else is willing to take it and give it better educational and material advantages, does not justify the court in transferring its custody.

—State ex rel. v. Beardsley, 439.

Of Illegitimate Child.

2. An illegitimate child cannot be adopted without the consent of the mother. Her consent, though given in writing and accompanied by a transfer of the custody of the child, may be revoked at any time before the child is legally adopted.

—State ex rel. v. Beardsley, 435.

ALIENATION OF AFFECTION. See Husband and Wife, 3, 4; Trial, 1.

APPEAL AND ERROR.

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When Appeal Can Be Taken.

1. An order granting a new trial for insufficiency of the evidence to sustain the verdict is appealable where a previous verdict in favor of the appellant has been set aside on the same ground. It is immaterial whether the two orders were made by the same judge or by different judges.

—Guest v. Northern Motor Car Co. 231.

When Appeal Cannot Be Taken.

2. An order granting a new trial which falls to state expressly that it is granted exclusively upon errors occurring at the trial, is not appealable. Laws 1913, p. 699, c. 474, amending R. L. 1905, § 4365, subd. 4.

—Barwald v. Thuet, 495.

Defense Not Made Below Will Not Be Considered.

3. The defense that plaintiff had made false answers to questions in

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the application for insurance was not urged at the trial and cannot be considered for the first time on this appeal.

—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co. 262.

4. Objection to the charge not made in trial court will not be considered on appeal.

—Maryland v. L. R. Christenson Co. 65.

Settled Case.

5. In the absence of a settled case this court cannot review the action of the trial court in directing a verdict.

—Chance v. Hawkinson, 91.

Assignment of Error. See Trial, 8.**What is Reviewable.**

6. Two cases. Judgment in one was entered in June, 1919; in the other in November, 1920, pursuant to a directed verdict. There was no order consolidating the cases. The second judgment does not mention the additional parties in the other action. Neither the court nor the parties treated the cases as consolidated. The appeal is from the second judgment. Held: The appeal brings for review the judgment in one.

—Chance v. Hawkinson, 91.

Existence of Testimony Corroborating an Accomplice Not Reviewable.

See Criminal Law, 11.

Reception of Evidence.

7. Whether record entries relative to the issues made in the regular course of business are properly verified as a basis for receiving them in evidence, is a question for the exercise of practical sense and sound discretion by the trial judge, and his decision will not be disturbed on appeal if there is any evidence reasonably supporting it.

—Di Vita v. Payne, 405.

8. On an appeal from an order denying a motion to dissolve a writ of attachment upon the ground of a fraudulent transfer of property, where the affidavits are conflicting, the determination of the trial court will not be disturbed if there is evidence fairly supporting it. In this case the evidence sustains the finding of fraud necessarily included in a general order refusing to dissolve the writ.

—Stockhaus v. Lind, 423.

Harmless Error.

9. The findings, which do not harm, but rather justify greater relief

APPEAL AND ERROR—Continued.

than appellant otherwise could have, cannot be complained of by her.

—Speiss v. Speiss, 314.

10. Nor can error be predicated upon a ruling sustaining an objection to a question where a concession by the objector answers the question so that the party examining is seemingly satisfied.

—Fruen Cereal Co. v. Chenoweth, 461.

11. Excluding testimony to prove a fact which later in the trial was conceded cannot be prejudicial.

—Fruen Cereal Co. v. Chenoweth, 461.

Prejudicial Error.

12. An instruction to the effect that to constitute a ratification of a transaction, requires an acceptance on the part of the plaintiff of the fruits and benefits of the transaction, was, under the evidence, prejudicial to the rights of the defendant.

—The Farmers Co-Operative Exchange Co. v. Fidelity & Deposit Co. 171.

Reversal. See Conspiracy, 3.

13. The reversal of an order denying a new trial leaves the case where it stood before it was brought to trial. The second trial is not controlled by the evidence or proceedings at the first.

—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co. 261.

Amendment to Pleading.

14. Upon a former appeal in this case a judgment in favor of defendant was reversed. After the going down of the remittitur defendant made an application for leave to file an amended answer in the form of a cross-complaint, and for a new trial. The application being denied, this appeal was taken. We find no error or abuse of discretion in denying appellant's application.

—Chicago Great Western Railroad Co. v. Zahner, 27.

ARMY AND NAVY.

Conspiracy to Discourage Enlistment in Military Forces of United States. See Conspiracy, 1.

There was no error under the facts stated in the opinion in excluding evidence that a third person was in the naval service. The Soldiers and Sailors Civil Relief Act was without application.

—Chance v. Hawkinson, 91.

ARREST. See False Imprisonment.

Without a Warrant.

Under the statutes of this state, a peace officer may arrest without s

ARREST—Continued.

warrant, when the person arrested has in his presence committed or attempted to commit any public offense, either a felony or a misdemeanor; when he has committed a felony, though not in the officer's presence; when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed it; upon a charge made upon reasonable cause of the commission of a felony by the person arrested; and at night when the officer has reasonable cause to believe that the person arrested has committed a felony, though no felony has in fact been committed. There is no authority for arrest without a warrant because of mere belief that a person has committed a misdemeanor.

—Hilla v. Jensen, 58.

ASSOCIATION.**Service of Process on Member of Trade Union.**

The defendant union, an unincorporated voluntary association, is a trade union, having the interests and welfare of its members as an object. In addition it provides through dues received a union printers' home for infirm and invalid members, and old age pensions and death benefits. The cause of action alleged arises from a wrongful refusal to admit the defendant to the home. Under the showing made, as set forth in the opinion, jurisdiction was acquired by service on a member of the defendant, as is provided by G. S. 1913, § 7689, for service when two or more do business as associates under a common name.

—Fitzpatrick v. International Typographical Union of North America, 401.

ATTACHMENT.**In Action for Alienation of Affection.**

A writ of attachment may issue in an action for alienation of affections.

—Stockhaus v. Lind, 423.

Appeal from Refusal to Dissolve Writ. See Appeal and Error, 8.

ATTORNEY AND CLIENT.**Disbarment.**

1. An attorney was charged with signing a codicil to a will as attesting witness after the death of testatrix, and thereafter using the codicil so attested in procuring a settlement of a lawsuit. Held that the evidence submitted is not sufficient to sustain the charge.

—In re Disbarment of Thomas Mohn, 373.

Failure to Give Information to Client.

2. The facts alleged in defendant's second defense and counterclaim,

ATTORNEY AND CLIENT—Continued.

to the effect that the directors of the investment company had authorized its attorneys to dismiss the action against him if, by so doing, they could procure the dismissal of six actions brought by other parties in which the company was directly or indirectly a defendant, and that plaintiffs knew that such authority had been given but failed to inform defendant thereof, were not sufficient to constitute a defense or counterclaim, and the court properly excluded the evidence offered thereunder.

—Selover v. Hedwall, 303.

Allowance of Fee of Receiver's Attorney. See Receiver.

Payment of Attorney's Bill by Insured Sufficient Evidence of Value of Services in Action by Insured Against Insurer. See Insurance, 9.

AUTOMOBILE.

When Motor Cycle Policeman Pursuing Lawbreaker Does Not Violate Motor Vehicle Act. See Municipal Corporation, 8.

Evidence as to Character of Railway Crossing and Amount of Traffic Thereon Admissible on Question of Negligence. See Railway, 4.

Evidence of Driver of Ford Car as to Proper Method of Driving over Specified Railway Crossing. See Railway, 8.

Driver of Truck Was Guilty of Contributory Negligence in Not Stopping when He Saw a Car Approaching a Railway Crossing. See Railway, 9.

BANK AND BANKING.

In reviewing the action of the State Securities Commission denying an application for a certificate authorizing a state bank to transact business, this court cannot interfere unless it appears that the commission failed to keep within its jurisdiction or proceeded on an erroneous theory of the law or acted arbitrarily, oppressively, and unreasonably so that its determination represents its will, and not its judgment, or is without evidence to support it. The facts disclosed by the evidence recited in the opinion do not warrant the conclusion that the commission exercised arbitrary power instead of its candid judgment in denying the application.

—State ex rel. v. State Securities Commission, 101.

BASTARD.

1. An illegitimate child is legitimized by the marriage of his parents.
—Hendrickson v. Town of Queen, 80.

2. If the minor had a father able to support him, the father was ultimately liable for the payment of the necessary expenses. If he had no relative who was liable, and his legal settlement was in another town, such town could be compelled to pay the expenses.
—Hendrickson v. Town of Queen, 80.

BILL OF LADING.

Provision in Bill for Interstate Shipment Requiring Notice of Claim in Writing, Cannot Be Waived by Shipper. See Carrier, 5.

BILLS AND NOTES.**Renewal Note Negotiated in Violation of Promise.**

1. A note given in renewal of a valid note is good in the hands of an assignee of the payee, without proof of his good faith, though when the payee took the renewal he promised the maker that he would place it as collateral to a loan then contemplated and would not otherwise negotiate it, and, failing to procure such loan, negotiated it in violation of his promise.

—Farmers State Bank of Cologne v. Skellet, 266.

Presentment and Demand.

2. Where the holder of a negotiable instrument presents it to the maker for payment, the presentation and demand being in all respects in full compliance with the law, and payment is refused and the instrument thus dishonored, to fix and continue the liability of an indorser, notice of the dishonor must be given within the time fixed by the negotiable instruments act, in default of which the indorser will be discharged.

—Torgerson v. Ohnstad, 46.

3. Where the presentation and demand conforms in all respects to the statutory requirements, and the refusal of the maker to pay is thus brought home to the holder, his failure to notify the indorser cannot be excused on the theory or claim that a formal presentation and demand, though in fact made, was not intended.

—Torgerson v. Ohnstad, 46.

4. The failure to give the notice discharges the indorser, and a subsequent presentation and demand for payment, attended with the same formalities some six months later, followed by proper notice to the indorser, will not revive his liability.

—Torgerson v. Ohnstad, 46.

When Fraud in Inception Burden of Proof on Holder.

5. When it was shown that negotiable promissory notes were obtained by the fraud of the payee, the burden of proving that it became a holder in due course was cast on a bank to which they were indorsed by the payee without recourse.

—Farmers State Bank of Garden City v. Cooke, 227.

Question for Jury.

6. Although the testimony that the notes were purchased in good faith was not directly contradicted, the inferences to be drawn from all

BILLS AND NOTES—Continued.

the circumstances might lead to a different conclusion by reasonable men, and hence the question of whether the bank was a holder in due course was properly submitted to the jury.

—Farmers State Bank of Garden City v. Cooke, 227.

BOND.

To Guaranty Payment of Bank Certificate. See Principal and Surety.

1. A voluntary bond, other than an official bond, based upon a valid consideration, is enforceable as a common-law bond according to its conditions, although they are more onerous than would have been required if a statutory bond had been given to effect the same purpose.

—Carlson v. American Fidelity Co. 117.

2. When there is no doubt about the meaning of the language of a bond which purports to be executed in compliance with a statute, there is no need of referring to the statute.

—Carlson v. American Surety Co. 118.

BROKER.

Authority to Act for Owner.

1. The evidence is sufficient to sustain a finding that a broker who negotiated a lease of certain property in controversy was the agent of the lessor.

—O'Neill v. Davidson, 457.

Revocation of Authority.

2. Unless a broker's agency was exclusive, the owner could place the property with another broker for sale, and if the latter produced a purchaser first, the agency of the former would be revoked.

—Wetmore v. Hudson, 335.

Sale by Owner—When Commission Is Due Broker.

3. In consideration of plaintiff's efforts to sell certain real estate, defendant gave plaintiff the exclusive right to sell it for a period of 30 days and agreed to pay plaintiff a specified commission upon any sale made while the contract remained in force whether made by plaintiff or defendant. Plaintiff accepted the employment by advertising the property and taking prospective purchasers to examine it. Defendant sold the property himself within the 30 days. Held, that plaintiff was entitled to recover the stipulated commission.

—Confer Brothers, Inc. v. Colbrath, 259.

4. Where a real estate broker has no exclusive right of sale, the owner of the land is not precluded from the right of sale to any person who may present himself, and, in case sale is made before the

BROKER—Continued.

broker presents a purchaser, is not liable to the broker for a commission on a sale subsequently made by him.

—Peters v. Ruebenhagen, 474.

Amount of Compensation.

5. A contract between a real estate broker and a purchaser of certain property by which the matter of the broker's compensation "was left entirely" with the purchaser held to entitle the broker to the reasonable value of his services, and not to vest in the purchaser the right to refuse payment of any compensation at all. *Butler v. Winona Mill Co.*, 28 Minn. 205, 9 N. W. 697, distinguished.

—F. R. Stocker Realty Co. v. Porter, 185.

Evidence.

6. Action by a real estate broker to recover compensation for procuring a purchaser for real estate. Held, that the evidence justified a verdict in favor of the defendant.

—Wetmore v. Hudson, 332.

7. The evidence sustains the verdict of the jury to the effect that the sale made by the broker was reported to the landowner prior to the sale by him and rejected without cause.

—Peters v. Ruebenhagen, 475.

Question for Jury.

8. Whether appellant's authority was revoked by a sale made through another broker before appellant produced a purchaser was properly submitted to the jury.

—Wetmore v. Hudson, 332.

Fraud of Broker.

9. The plaintiffs, in the name of one of them as vendee, made a contract to purchase lands. The other party to the contract, as vendor, was the agent of the owner. The agent then made a contract to purchase of the owner. It was the understanding that the plaintiffs were the purchasers and the owner the seller. The two contracts were made as a part of the plan for effecting a sale and passing title. The agent by agreement with his principal was to have all of the sale price in excess of a fixed sum. The plaintiffs paid a part of the purchase price. The sale was induced by the fraud of the owner and his agent. It is held that the plaintiffs can maintain an action to rescind the contract made in the name of the agent as vendee and can recover of both defendants the amount which they paid to the agent in consummating the transaction, and that they are not limited to a recovery from each of the amount received by him.

—Berry v. Roth, 389.

CANCELATION OF INSTRUMENT. See Insanity, 1.

CARRIER.

Interstate Express Company Liable to Injured Servant under Workmen's Compensation Act. See Workmen's Compensation Act, 1.

Interstate Shipment of Wood Pulp Not Taxable. See Taxation, 1.

Responsible for Damage in Transit.

1. A common carrier is an insurer of the safe transportation of goods committed to it for that purpose, and responsible for all damages to the same while in transit, unless such damage is occasioned by certain excepted causes.

—*Di Vita v. Payne*, 405.

2. It is the duty of railway company as a common carrier to furnish suitable cars for the transportation of the particular class of goods intended to be shipped, and it is not relieved from such duty by reason of the fact that the consignor inspected the car before loading.

—*Di Vita v. Payne*, 405.

3. To relieve itself from such liability the carrier must show that the damage arose solely from one or more of the excepted causes, and it avails it nothing to show that the shipper was negligent if the damage would not have resulted except for the concurring fault of the carrier.

—*Di Vita v. Payne*, 405.

Damage to Shipment in Transit.

4. Proof of the delivery of a shipment by consignor to the carrier in good condition and of its delivery to the consignee at the end of the route in damaged condition is sufficient to sustain a recovery for damages against the initial carrier.

—*Di Vita v. Payne*, 405.

Written Notice of Claim for Loss.

5. Where a carrier has filed a form of bill of lading for interstate shipments with the Interstate Commerce Commission and such form has been approved by the commission, a provision therein to the effect that no claim for loss or damage can be enforced unless notice of such claim was given in writing within the time prescribed therein cannot be waived by the carrier.

—*Carbic Manufacturing Co. v. Western Express Co.* 467, 473.

6. An oral notice that the shipment has been lost followed by a "tracer" sent out by the carrier in an attempt to locate it is not a compliance with such provision.

—*Carbic Manufacturing Co. v. Western Express Co.* 467, 474.

CARRIER—Continued.**Transportation of Passengers.**

7. That a passenger in a street car falls over a sample case which another passenger has placed on the floor beside him does not, as a matter of law, establish the street car company's negligence; and the court's instruction that if the sample case was so placed and plaintiff fell over it she was entitled to damages, unless she was guilty of contributory negligence, was erroneous.

—Rittle v. St. Paul City Railway Co. 216, 218.

CASES (MINNESOTA) DISTINGUISHED.

Barron v. Liedloff, 95 Minn. 474, 104 N. W. 289.

—Force v. Gottwald, 272.

Bowers v. Chicago, M. & St. P. Ry. Co. 141 Minn. 385, 170 N. W. 226.

—Mullen v. Devenney, 251, 253, 254.

Butler v. Winona Mill Co. 28 Minn. 206, 9 N. W. 697.

—F. R. Stocker Realty Co. v. Porter, 185, 186.

Gardner v. Board of Co. Commrs. 21 Minn. 33.

—George C. Lauer Stone & Construction Co. v. Armour & Co. 361, 363.

Geddes v. Van Rhee, 126 Minn. 517, 148 N. W. 549.

—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co. 265.

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CITY OF DETROIT. See Intoxicating Liquor, 1, 2.

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- Discharge of Employe by the Board of Public Welfare. See Municipal Corporation, 1-5.

CITY OF ST. PAUL. See Municipal Corporation, 10, 11; Taxation, 2, 3.

CONDITION.

In Deed Prohibiting Alienation of Grantee During Life of Grantor, Construed as Condition Subsequent. See Deed, 1.

CONSPIRACY.**To Discourage Enlistment.**

1. To establish a charge of a conspiracy to violate chapter 463, Laws 1917, the state must prove that defendants had concerted to teach that men should not enlist in the military forces of the United States or aid in carrying on the war with Germany. A combination for an unlawful purpose is the foundation of the offense, and an overt act in furtherance of such purpose completes the offense. All who are parties to the combination incur guilt when one does such an act. The combination need not be established by direct evidence, but may be inferred from circumstances.

—State v. Townley, 5.

2. There were no errors in rulings admitting or excluding evidence, and the evidence, direct and circumstantial, was sufficient to support the verdict.

—State v. Townley, 5.

3. If guilt is clearly established, a criminal conviction will not be reversed for technical errors, where the substantial rights of the accused have not been so violated as to make it reasonably clear that a fair trial was not had.

—State v. Townley, 6.

CONTRACT.**Mental Capacity to Contract.**

1. To establish that a person lacked mental capacity to make a contract, it must appear that he was unable to comprehend, to a reasonable extent, the nature and effect of the contract.

—Rogers v. Central Land & Investment Co. 347.

Monopoly.

2. Neither the contract, nor plaintiff's manner of doing business, nor the entry of a like contract with defendant's competitor, was in violation of sections 8595, 8903, 8973, or 8974, G. S. 1913.

—Stronge & Warner Co. v. H. Choate & Co. 31.

3. The evidence did not show the contract between plaintiff for the conduct of the millinery department in defendant's department store to have been procured by fraud or collusion so as to justify a denial of relief.

—Stronge & Warner Co. v. H. Choate & Co. 31.

Breach.

In Furnishing Film Pictures Enjoined. See Injunction, 4.

CORPORATION.**Rescission of Sale of Stock.**

1. In an action to rescind a contract for the sale of stock in a corporation, where it appears that plaintiff continued her efforts to surrender the stock and recover the money paid therefor for a period of three years, though not in form amounting to a legal demand, held, that the testimony does not support a finding that plaintiff was guilty of laches.

—Ricker v. J. L. Owens Co. 130.

Record Transfer of Stock.

2. The provisions of the statutes and of the by-laws regulating the transfer of stock are for the benefit of the corporation and may be waived by the corporation.

—Ohman v. Lee, 452.

3. Where the holder of capital stock sells, assigns and delivers it to another, and in the assignment authorizes the corporation to transfer the stock to the purchaser on its records, the corporation, on learning of such assignment, may make such transfer on its records without a surrender of the stock or a request from the purchaser.

—Ohman v. Lee, 451.

4. By purchasing the stock the purchaser gave authority to transfer it to him of record.

—Ohman v. Lee, 452.

5. Where the corporation recorded the transfer of stock on the stubs from which the certificates were detached and kept no other record thereof, such stubs constituted the transfer book of the corporation and were evidence of the transfers noted thereon.

—Ohman v. Lee, 452.

6. Transfers appearing on the records are presumed to have been properly made, and as there is nothing to impeach the record of the transfer of the stock in controversy to defendant, he was a registered stockholder and liable to creditors as such.

—Ohman v. Lee, 452.

Liability of Purchaser of Stock to Creditors.

7. Where the purchaser of capital stock thereafter exercises the rights of a stockholder and is recognized as such by the corporation, he thereby acquires the rights and becomes subject to the liabilities of a stockholder, although his stock may not have been transferred to him on the records.

—Ohman v. Lee, 452.

Enforcement of Stockholder's Liability.

8. The assessment levied by the court against a stockholder in a cor-

CORPORATION—Continued.

poration does not preclude the defense that he was not a stockholder at all, or was not the holder of so large an amount of stock as was alleged in the complaint in an action brought to enforce his constitutional liability.

—Harrison v. Carman, 365.

9. The evidence did not justify the court in directing a verdict against defendant for the full amount of his assessments.

—Harrison v. Carman, 365.

Company Bound by Act of Secretary of Its Medical Director. See Insurance, 12.

COSTS.

Requiring Defendant in Criminal Case to Pay Disbursements of the State Properly Taxable in a Civil Action. See Criminal Law, 22, 23.

COURT.

Procedure in State Court Not Affected by Federal Appeals Act, 1911.
See State.

Objection to Jurisdiction.

1. A defendant may challenge the jurisdiction of the court, and, if his objection is overruled, may answer and defend on the merits without waiving his objection to the jurisdiction. But if he presents a counterclaim and asks for an affirmative judgment thereon he invokes the power of the court in his own behalf, and thereby submits himself to its jurisdiction.

—Morehart v. Furley, 56.

Municipal.

Interpleader Available to Defendant in Municipal Court of Minneapolis.
See Interpleader, 1.

Probate.

Its Judgment Has the Same Effect as One of the District Court. See Judgment, 1.

Its Decree May Be Set Aside in District Court for Fraud. See Judgment, 5.

2. The fact that an administrator has been appointed in another state and an action on the death claim commenced there does not go to the jurisdiction of the probate court of this state.

—State ex rel. v. The Probate Court for Hennepin County, 464.

CRIMINAL LAW.

What Judgment Justifies Discharge of Defendant. See Habeas Corpus, 1, 2.

CRIMINAL LAW—Continued.

Cross-Examination of State's Principal Witness. See Witness, 1, 2.

Negative Evidence as to Defendant's Reputation. See Criminal Law, 3.
Evidence of Independent Crime.

1. Evidence of two apparently independent crimes, committed by the same person at about the same time, held admissible on the trial of an indictment charging one thereof, as tending to connect defendant with the commission of both as a part and parcel of one transaction.

—State v. Pugliese, 126.

Separate Trial of Codefendants.

2. It is discretionary with the trial court to grant separate trials of defendants jointly indicted for a misdemeanor.

—State v. Townley, 6.

3. If a witness has known the defendant long enough and under such circumstances that he would be likely to have heard remarks derogatory to his character if they had been made, he may give evidence negative in form as to defendant's reputation. Defendant was not prejudiced by the exclusion of such evidence after he was allowed to introduce a large amount of character evidence.

—State v. Morris, 41.

Unsworn Statement of Accused.

4. Since the accused may now testify in his own behalf if he desires, the courts should no longer follow or recognize the practice obtaining at common law of permitting him to make an unsworn statement to the jury at the close of the case.

—State v. Townley, 6.

Accused Cannot Make Closing Argument.

5. There is no constitutional provision conferring upon the accused the right to make the closing argument to the jury in his own behalf. He is guaranteed the right of having the assistance of counsel for his defense, and counsel cannot be imposed upon him against his will, but if he elects to be represented by counsel who conduct the defense until the time comes to make the argument to the jury, he cannot ostensibly discharge them and then insist on making the closing argument himself, especially where he did not take the stand as a witness. It is within the discretion of the trial court to permit him to do so, and, under the facts disclosed by the record, it did not abuse its discretion in refusing such permission.

—State v. Townley, 7.

Charge as to Degree of Crime.

6. If the evidence permits of no doubt as to the degree of the crime,

CRIMINAL LAW—Continued.

the court may properly instruct the jury either to convict of the crime charged or to acquit, but the defendant should request such an instruction if he desires to waive the benefit of sections 8476 and 9213, G. S. 1913.

—State v. Morris, 41.

Time for Asking Instructions.

7. It was within the discretion of the trial court to receive and consider defendants' requests for instructions not submitted until near the end of the argument of the prosecuting attorney, notwithstanding the request of the court, made several days before, that the attorneys present their proposed instructions in time to enable the court to consider them. Section 7802, G. S. 1913, is applicable to the trial of criminal as well as civil actions.

—State v. Townley, 6.

Misconduct of Prosecutor.

8. On the trial of an indictment the court made an order excluding the state witnesses from the court room until called to testify. Prior to the indictment the witnesses had given their testimony before an examining magistrate which was reduced to writing. Subsequent to the order excluding the witnesses from the court room the prosecuting attorney handed to each of them a transcript of the evidence given before the magistrate, with the suggestion that each read over what he had formerly testified to, for the purpose of refreshing his memory, and each did so. Held not misconduct on the part of the prosecuting attorney.

—State v. Pugliese, 126.

New Trial.

9. Defendants are not entitled to a new trial on the ground of misconduct on the part of the court or opposing counsel.

—State v. Townley, 6.

10. The admission of evidence of doubtful relevancy is not alone sufficient ground for a new trial where there was ample competent evidence to warrant the jury's conclusion respecting defendant's guilt.

—State v. Townley, 6.

Accomplice. See Criminal Law, 15.

11. Defendants were not entitled to an instruction that Stoppler, jointly indicted with them but a witness for the state, was an accomplice. And since there was no request for an instruction that, should Stoppler be found an accomplice, there must be an acquittal for

CRIMINAL LAW—Continued.

lack of corroborating testimony, the question of the presence or absence of such testimony is not here for review.

—State v. Pennington, 109.

No Reversal on Appeal for Technical Errors if a Fair Trial Was Had.

See Conspiracy, 3.

Homicide.

12. The defendant was convicted of manslaughter in the first degree under the statute defining manslaughter in the first degree as an unjustifiable killing committed "in the heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon," upon the theory that in the heat of passion he intentionally knocked or threw the deceased over a stairway banister in an apartment house to the landing 28 feet below, whereby he was killed, though he did not intend killing him. The evidence was such as to justify a finding that the defendant in the heat of passion struck the deceased with his fist and knocked or pushed him against the banister, but with no intention of putting him over, or of doing more than strike him or push him against the banister, or of doing him harm at all other than such as would naturally result from striking or pushing him. It is held that the defendant was entitled to an instruction submitting manslaughter in the second degree, defined by the statute as an unjustifiable killing "in the heat of passion, but not by a deadly weapon or by use of means either cruel or unusual."

—State v. Abdo, 195.

13. If the facts proved under an indictment for murder in the first degree warrant a conviction of manslaughter in the second degree, the defendant upon request is entitled to the submission of such degree of manslaughter.

—State v. Abdo, 195.

14. The evidence sustains the verdict finding the defendant Rauslange guilty of murder in the second degree; but it is insufficient to sustain the verdict against the defendant Pennington.

—State v. Pennington, 109.

Larceny.

15. The evidence referred to in the opinion satisfied the requirements of section 8463, G. S. 1913, relating to the corroboration of an accomplice and justified the jury in returning a verdict of guilty.

—State v. Morris, 41.

CRIMINAL LAW—Continued.

16. The evidence supports the verdict, and there were no errors in the admission or exclusion of evidence nor in the charge to the jury.

—State v. Morris, 41.

—State v. Pugliese, 126.

17. A defendant indicted for grand larceny in the second degree cannot complain because the court permitted the jury to find him guilty of petit larceny, although the evidence strongly tended to show that, if guilty at all, he was guilty of the crime charged.

—State v. Morris, 41.

Rape.

18. A defendant may be convicted of an assault in the third degree under an indictment charging him with an attempt to commit rape by forcibly overcoming the resistance of the female, as the commission of an assault is necessarily included in the offense charged.

—State v. Christofferson, 134.

19. Under an indictment charging carnal knowledge of a child under the age of consent, the accused may be convicted of an attempt to commit that crime, where the testimony failed to establish the commission of the crime charged, but did establish an attempt to commit such crime.

—State ex rel. v. Brown, 297.

20. It was proper for the state to make use of portions of the testimony of the prosecutrix taken at the preliminary hearing to explain and supplement portions thereof as to which she was interrogated by way of impeachment upon cross-examination. It was not proper to introduce all of her testimony at the preliminary hearing; but in view of the nature of such testimony, and the issue presented, and the general conduct of the trial, there was no prejudice.

—State v. Schomaker, 141.

21. The evidence sustains the jury's finding that the defendant was guilty of rape.

—State v. Schomaker, 141.

Sentence.

22. In passing sentence upon a man convicted of the crime of attempting to have carnal knowledge of a female under the age of 18 years, the district court may require the payment of such items of the state's disbursements as would be properly taxable against the defeated party in a civil action, in addition to the penalty imposed as punishment for the crime.

—State v. Morehart, 432.

23. Such disbursements must be properly ascertained and taxed be-

CRIMINAL LAW—Continued.

fore their payment can be adjudged as part of the sentence pronounced by the court.

—State v. Morehart, 432.

CUSTOM.

The practice for persons of limited capital or special qualifications in certain lines of trade, requiring but little room for operation, to procure space in a large mercantile establishment wherein to operate under some agreement with the establishment and in its name, has become so general in our large cities that courts should hesitate to brand it unlawful, unless there is evidence that evil has resulted in the particular case wherein the practice is assailed. An accepted general business usage is itself strong evidence as to what is in accord with public policy.

—Stronge & Warner Co. v. H. Choate & Co. 38.

DAMAGES. See Fraud, 2.

For Breach of Lessor's Covenant to Make Improvements. See Landlord and Tenant, 6.

General. See Landlord and Tenant, 4, 9.

Special. See Landlord and Tenant, 3, 9.

In Action for Breach of Contract.

Relief Against Breach of Contract. See Injunction, 1.

Loss of Profits. See Landlord and Tenant, 7, 8.

1. In the absence of a finding that plaintiff had failed to perform a substantial part of the contract, plaintiff would have been entitled to recover under the allegations of the complaint for the loss of profits during the whole time that it was deprived of doing business under the contract.

—Stronge & Warner Co. v. H. Choate & Co. 31.

In Action for Breach of Cropper's Contract.

2. Where a large part of the rent was in money and the balance in kind, the general damages would seem to be the difference between what the whole rent in cash per year would have been at the time the lease was made and the cash rental value at the time of the breach, or the monetary value of the contract when breached.

—Glaubitz v. Meyer, 164.

In Actions for Personal Injury—Excessive.

3. Plaintiff sustained injury while in defendant's employ. The evidence is ample to sustain a finding of defendant's negligence. Plaintiff claims paralysis of the left arm and leg. A verdict for \$30,000 can stand only on the assumption that paralysis of both

DAMAGES—Continued.

arm and leg is permanent. The evidence is sufficient to sustain a finding of permanent paralysis of the left arm but not of the left leg. Held: The damages are excessive.

—Appleby v. Payne, 77.

4. Action for personal injury. Plaintiff, who was over 70 years of age when injured, had two ribs fractured, resulting in a puncture of the pleural cavity. Verdict for \$2,500. Held: Unless plaintiff consented to a reduction of the verdict to \$1,700, defendant was granted a new trial.

—Burchfield v. West, 496.

DEATH.

An action may be maintained in this state to recover on a claim for wrongful death of a nonresident of the state, suffered out of the state. An administrator may be appointed in this state where the only asset is such a death claim.

—State ex rel. v. The Probate Court for Hennepin County, 464.

DEED. See Set-Off and Counterclaim.

Intent of Parties Must Be Given Effect. See Mortgage, 1, 3-5.

1. The rule that conditions embodied in a conveyance of real property will be strictly construed, applied. Held, that the intent of the parties being clear, their rights and liabilities will be determined and enforced as in other contracts, and that a provision in a deed that it should be void if the grantee sold or encumbered the land during the lifetime of the grantors, created a condition subsequent.

—Furst v. Lacher, 53, 55.

Want of Consideration.

2. Action in ejectment. Plaintiff relied on a certain deed. Defendant contended and the court found that the grantor in the deed was incapable of understanding the nature of the transaction; that the deed was without consideration, and was obtained by fraud. The evidence sustains these findings.

—Crane v. Veley, 84.

DEPARTMENT STORE. See Custom; Injunction, 1.

DISMISSAL AND NONSUIT. See Attorney and Client, 2.

Upon the Merits. See Garnishment.

1. While the district court may at any time before trial, upon application by the plaintiff and sufficient cause shown, dismiss an action,

DISMISSAL AND NONSUIT—Continued.

yet such cause must relate to and affect the legal rights of the parties litigant.

—Wollenschlager v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 220.

2. A personal-injury action was brought by one attorney in Hennepin county. While pending, plaintiff signed a dismissal of the action and employed a firm of attorneys who brought a similar action in Ramsey county. The next day plaintiff wrote a letter discharging the firm, and the following day the first attorney brought another action in Hennepin county. The defendant company refused to accept a second dismissal of the Ramsey county case. But that case was dismissed after hearing of an order to show cause obtained by the first attorney. Held: The record discloses no legal cause for the dismissal of the second action.

—Wollenschlager v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co. 220.

DIVORCE.**For Cruelty.**

1. There is no difference in the degree of cruelty which justifies a decree for an absolute and one for a limited divorce. But the cruelty which justifies a spouse in living apart from the other, may not entitle to a divorce at all.

—Wulke v. Wulke, 292.

First Action Not Res Judicata in Action by Other Spouse.

2. The wife brought an action for divorce on the ground of cruel and inhuman treatment. The divorce was denied. After the lapse of a year since the wife left, the husband brought this action for divorce on the ground of desertion. She denied the desertion, and counter-claimed for support, alleging that the husband's mistreatment had compelled her to leave him. It is held following Stocking v. Stocking, 76 Minn. 292, 79 N. W. 172, 668, that the first action is not res judicata of the issues raised by the answer in the second action.

—Wulke v. Wulke, 289.

3. The evidence in this case is sufficient to sustain the court's finding for defendant on the issue of alleged cruel and inhuman treatment.

—Eberhart v. Eberhart, 192.

4. There is evidence reasonably supporting the findings that there was no wilful desertion of defendant, and that plaintiff's mistreatment of defendant rendered it unsafe and improper to longer cohabit with him.

—Wulke v. Wulke, 289.

DIVORCE—Continued.**Domicile of Plaintiff.**

5. The record sustains the finding that the plaintiff had been a resident of Minnesota for a full year before the commencement of the action.

—Laird v. Laird, 104.

Vacating Judgment.

6. A final judgment in an action for divorce cannot be vacated on the ground that the defendant failed to answer through mistake or excusable neglect.

—Laird v. Laird, 104.

7. Ejectment brought by divorced woman against her former husband. Held: The jurisdiction of a foreign court in a divorce action in which the husband had answered could not be questioned, and the decree therein, insofar as it bears on the marriage status of the parties, is binding in Minnesota. While it could not affect their rights in or to Minnesota real estate, it terminated all rights that the husband had in the wife's property, including his homestead right in her real estate.

—Gummison v. Johnson, 331.

Allowance of Suit Money and Fees by Supreme Court.

8. This court may make an allowance for counsel fees and suit money in connection with an appeal in a divorce case, and where an application is made during the pendency of the appeal it may be continued to be determined on decision of the case.

—Eberhart v. Eberhart, 192, 194.

Disposition of Property.

9. In the absence of statutory authority the courts have no power in divorce proceedings to deal with the property right of the parties.

—Nelson v. Nelson, 285.

Purchase of Land by Husband in Name of Wife.

10. The wife becomes the absolute owner of land when her husband pays the consideration and causes the title to be vested in her, subject only to the rights of creditors, and it cannot be taken from her in divorce proceedings, except to the extent authorized by G. S. 1913, § 7124, where a divorce is granted the husband.

—Nelson v. Nelson, 286.

Community Property.

11. The doctrine of community property, as applied to the marriage relation, in force in some of the states of this country, exists only by statute, has never been adopted or made a part of the law of this state, and a distribution of property in divorce proceedings cannot be made thereunder.

—Nelson v. Nelson, 285.

DIVORCE—Continued.**Custody of Child.**

12. In determining the question of custody of a child, the best interest of the child is the primary consideration. Divided custody is not desirable. A son of the parties, five years old, under the circumstances of this case, should be given into the custody of the plaintiff, his mother, with liberal opportunity to defendant, his father, to visit and associate with him.

—Eberhart v. Eberhart, 192, 194.

EJECTMENT.**Defense of Possession.**

1. The grantor in the deed is now deceased. She left a will giving to the grantee the land covered by the deed. Probate of the will was contested by defendant, who is a son of the testator. The will was disallowed by the probate court and an appeal is now pending. These facts do not preclude defendant from maintaining his defense based on possession.

—Crane v. Velez, 84.

2. The plaintiff was deprived of no right given by Laws 1919 (Ex. Sess.), c. 5.

—Chance v. Hawkinson, 92.

ELECTION.**Unauthorized Name on Official Ballot.**

When a candidate or an elector neglects to take steps, under section 398, G. S. 1913, to have the name of a person not entitled to appear on the official ballot stricken therefrom, he cannot after the election is held raise a valid objection to counting the votes properly marked for such person, there being no claim that the latter had violated any provision of the election laws.

—Johnson v. Bauchle, 144.

EQUITY.

The rule applicable to the defense of laches does not depend entirely upon the lapse of time. It is an equitable defense based upon grounds of public policy. A party may be barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of the right.

—Ricker v. J. L. Owens Co. 130.

ESTOPPEL.

Against Candidate or Elector Who Neglects to Have Name of Unauthorized Candidate Stricken from Official Ballot. See Election.

EVIDENCE.**Judicial Notice.**

1. The court will not take judicial notice of the amount of travel on an avenue merely from its name.

—Engel v. Minneapolis Street Railway Co. 359.

Burden of Proof. See Bills and Notes, 5; Landlord and Tenant, 8; Trust, 1. **Conversation over Telephone.**

2. A conversation over a telephone is admissible in evidence, since when one person in the usual manner calls another by phone, and the person who answers assumes to act, the rebuttable presumption arises that he was the person called and who he assumes to be.

—Wetmore v. Hudson, 332, 335.

Documentary.

Plat Admissible Even if Surveyor's Notes Are Not in Evidence. See Plat.

3. A pleading, made and verified by a party in another action, is competent evidence, so far as relevant, in an action to which he is a party.

—The Farmers Co-Operative Exchange Co. v. Fidelity & Deposit Co. 171.

Record of Transfer of Stock on Stubs in Stock Book. See Corporation, 5.

Account Books. See Pleading, 3.

4. The correctness of plaintiff's record of receipts and expenditures having been established by the one who made the entries, it was properly received in evidence as a memorandum in connection with his testimony, independently of the statute making account books competent evidence.

—Force v. Gottwald, 268, 275.

EXECUTOR AND ADMINISTRATOR.

Jurisdiction of Probate Court Not Affected by Appointment of Administrator in Foreign State. See Court, 2.

1. One against whom an administrator asserts a right of action has no standing in the probate court to object to the administrator whom the court has appointed unless the appointment is void on the face of the record.

—State ex rel. v. The Probate Court for Hennepin County, 464.

Cause of Action for Wrongful Death of Nonresident an Asset of Estate. See Death.

2. Plaintiff sued as administrator of the estate of the grantee in the deed. There are heirs who are not parties to the suit. It was not error for the court to adjudge that the deed is void and that the

EXECUTOR AND ADMINISTRATOR—Continued.

record of the deed and the registration certificate issued thereon be canceled.

—Crane v. Veley, 84.

EXPLOSIVE.

Defendant's driver, in filling a tank with kerosene, negligently permitted the oil to overflow. The tank was in the basement of a building occupied by plaintiff and others. Employees of the owner of the tank soaked up the oil with sawdust and shavings, some of which were left near a furnace located in the basement. In replenishing the fire in the furnace, an occupant of the building used a shovel with which the oily sawdust had presumably been scraped together. There was an instantaneous fire, and the building and plaintiff's property therein were destroyed. Held that:

- (1) The outbreak of a fire was within the range of reasonable foresight, and that a jury might have found that defendant was bound to anticipate it as probable.
- (2) The fact that damage would not have happened but for defendant's original negligent act did not, as a matter of law, necessitate the conclusion that such act was the proximate cause of plaintiff's injury.
- (3) The owner of the tank who attempted to remove the oil and the occupant of the building who added fuel to the furnace fire were independent responsible agents, whose acts intervened between defendant's negligence and plaintiff's injury, and hence the negligence of the defendant was not the proximate cause of the injury.

—Childs v. Standard Oil Co. 166.

FACTOR.

Regulation of Business of Buying and Selling Live Stock by Congress During Time of War. See War, 1, 2.

The business of commission men buying and selling stock at public stockyards is so affected with a public interest that the state may fix reasonable commission charges; and Laws 1919 (Ex. Sess.) c. 39, giving the Railroad and Warehouse Commission authority to fix reasonable commission charges, is constitutional.

—State v. Rogers & Rogers, 151.

FALSE IMPRISONMENT.

Unlawful Arrest in Apartment Building.

Peace officers raided a building of 30 apartments, some of which, they had cause to believe, the proprietress used or permitted to be used for purposes of prostitution. There is no evidence that they

FALSE IMPRISONMENT—Continued.

were in fact so used. Plaintiff and his wife lived in one of the apartments and were arrested without a warrant. There is no claim that the officers believed that they were in any sense connected with the management of the building. There was no thought that they were committing any offense except the misdemeanor of being inmates of a disorderly house. They were not committing and had not committed that offense. Held, their arrest was unlawful.

—Hilla v. Jensen, 58.

FEDERAL FOOD CONTROL ACT. See War, 1.**FIRE.**

Proximate Cause of Fire from Kerosene. See Explosive, 2.
Liability for Fire Set by Locomotive. See Railway, 1, 2.

FRAUD.

In Obtaining Deed Without Consideration from Incompetent Grantor.
See Deed, 2.

Decree of Probate Court May Be Set Aside for Fraud. See Judgment, 5.

1. In an action for damages for deceit in the sale of an ice machine, the complaint alleged that the seller represented that the machine, when installed, could and would keep the buyer's ice box at a temperature low enough to prevent meat from spoiling. Such a representation is held to be more than an expression of opinion or a prediction.

—Schmitt v. Ornes Esswein & Co. 370.

2. The machine was installed and an initial payment made on May 1. On May 25 a second payment was made. Even if it should be presumed that the buyer had then discovered that the machine had been misrepresented, he might complete performance of his contract without waiving the fraud, and then sue for damages for deceit.

—Schmitt v. Ornes Esswein & Co. 370.

FRAUDS (STATUTE OF).

Signature of Party to Memorandum of Sale.

1. In order to recover for the breach of a verbal contract of sale of goods within the statute of frauds, where the memorandum is not signed by the defendant, the writing containing his signature must connect itself with the memorandum, or must with other writings be so connected therewith, by reference or internal evidence, that parol testimony is not necessary to establish the connection with the verbal contract of sale; or else, if the signature was not appended to the writing for the purpose of becoming a part of the

FRAUDS (STATUTE OF)—Continued.

memorandum, the writing, in order to satisfy the statute, must clearly admit or confess that a sale was made.

—Quinn-Shepherdson Co. v. Triumph Farmers Elevator Co. 24.

2. A written memorandum made by the buyer of a carload of grain, in confirmation of a telephone message from the seller, and mailed to the seller on the day of the sale, where no part of the grain was ever delivered and no part of the purchase price paid, does not satisfy the requirements of the statute of frauds.

—Quinn-Shepherdson Co. v. Triumph Farmers Elevator Co. 24.

FRAUDULENT CONVEYANCE.**Subsequent Creditor.**

1. A conveyance may be fraudulent as to subsequent creditors, as when its purpose and effect is to defraud creditors whom it is expected the grantor will have, or when the conveyance is really in trust for the use of the grantor and is intended as a cover. The evidence was not such as to require a finding that the conveyance to the plaintiff was fraudulent as to the defendant, a subsequent creditor.

—Johnson v. Union Investment Co. 106.

2. In an action where the issue was whether a conveyance to the plaintiff was in fraud of the creditors of his grantor, of whom the defendant was a judgment creditor, it did not conclusively appear that the indebtedness represented by the judgment docketed after the conveyance existed at the time of it; and a finding of the jury that it did not, and that the defendant was a subsequent creditor, is sustained by the evidence.

—Johnson v. Union Investment Co. 106.

GARNISHMENT.

During the war defendant's draft on plaintiff for the price of a carload of beans was attached to an order bill of lading and forwarded by intervener bank to garnishee bank for collection. Plaintiff refused to accept the beans, but at the request of the Federal Food Commission and in order to unload and release the car, and on the understanding the money was to be held by the garnishee pending settlement, deposited the amount with the garnishee bank. Subsequently the garnishee remitted \$5,000 of the deposit to the intervener, with the consent of plaintiff. Later this action was brought. Held: The testimony was sufficient to support a finding that the plaintiff was the owner of the fund in the possession of the garnishee, and that intervener had no interest therein, and that the complaint in intervention be dismissed upon the merits.

—H. A. Dreves Co. v. Bad Axe Grain Co. 241.

GIFT.**Issue of Avoidance Not Presented by Pleadings.**

A claim was duly allowed against an estate, and, there being a deficiency of assets, the administrator sued defendant, alleging that he was indebted to decedent and had wrongfully converted to his use a certain savings bank deposit of decedent, changed some six months before decedent died to the joint account of decedent and defendant, and "payable to the order of either of the survivors." The administrator conceded that the change of the account amounted to an executed gift, but claimed it to be void as against the creditor named. It is held, in view of the concession and the pleading, the court was justified in finding, in effect, that there was no conversion. The complaint contained no allegation that a gift or transfer had been made to defendant, or any grounds for avoiding it in behalf of a creditor existing at the time it was made. And the court was not required to make findings on issues not presented by the pleadings and which cannot be held to have been litigated by consent.

—Kemp v. Holz, 237.

HABEAS CORPUS.**What Judgment Justifies Discharge of Defendant.**

1. It is only where the court pronounces a judgment in a criminal case which is not authorized by law, under the indictment, whether the trial has proceeded regularly or otherwise, that such judgment can be said to be void so as to require the discharge of the defendant upon habeas corpus.

—State ex rel. v. Brown, 297.

2. It was the duty of the court upon receipt of the verdict either to pass judgment thereon or to set it aside and order a new trial, but not to discharge the defendant. If the court erred in this regard it was an error arising in the progress of the trial and did not go to the jurisdiction so as to be taken advantage of upon habeas corpus.

—State ex rel. v. Brown, 297.

3. The presumption that a mother is a fit and suitable person to be intrusted with the care of her infant child was not overcome by the uncontroverted allegations of the return.

—State ex rel. v. Beardsley, 435.

Trial de Novo in Supreme Court.

4. On appeal from the judgment of the district court in a habeas corpus proceeding to determine the custody of a child, there is a trial of the issue de novo, although the parties stipulated that the cause

HABEAS CORPUS—Continued.

should be heard and decided solely upon the record in the district court, and this court will ascertain as best it may from the return to the writ, which was not traversed, what is for the best interests of the child.

—State ex rel. v. Beardsley, 435.

HEALTH.

1. Laws 1917, p. 803, c. 469, empowering the state fire marshal to condemn and by order direct the destruction, repair or alteration of any building which is especially liable to fire and so situated as in his judgment to endanger life or limb or other buildings, is drastic. The state in the exercise of its police power may do this without compensation, but the necessity for such sacrifice of private property must clearly appear.

—State Fire Marshal v. Fitzpatrick, 205.

2. The findings taken together demonstrate that the building condemned in its present condition is especially liable to fire and is so situated as to endanger life and limb and other property.

—State Fire Marshal v. Fitzpatrick, 203.

3. But the evidence does not support the finding that the building is beyond repair. On the contrary, it appears that by proper repair and alteration it will be as free from danger as any wooden building can be made. In that situation it was unreasonable and arbitrary to order the destruction without giving the owner the option to alter and repair.

—State Fire Marshal v. Fitzpatrick, 203.

HIGHWAY.**Right to Material in Bridges.**

1. Whatever proprietary title or interest an organized town may have in and to the material in bridges and to culverts constructed and installed upon regularly laid out town roads ceases and terminates by operation of law upon a transfer of the road to the county by action of the board of county commissioners under G. S. 1913, § 2505, in declaring it a state road.

—County of Roseau v. Township of Hereim, 292.

2. In respect to such material the town holds the naked legal title in trust for the public, and the legislature lawfully may transfer it to the county as a new trustee; such was the necessary effect of the statute and the proceedings thereunder in this case.

—County of Roseau v. Township of Hereim, 293.

HOMESTEAD.

Foreign Judgment in Divorce Terminated Husband's Homestead Right in Wife's Real Estate. See Divorce, 7.

HOMICIDE. See Criminal Law, 12-14.

HUSBAND AND WIFE.

Wife Presumed to Be Wholly Dependent upon Her Husband unless Voluntarily Living Apart from Him. See Workmen's Compensation Act, 7.

Wife Absolute Owner of Land Bought in Her Name with Husband's Earnings and His Consent. See Trust, 1, 2.

1. General Statutes 1913, § 6706, providing that where a grant of land is made to one person, the consideration being paid by another, no trust shall result in favor of the one making the payment, applies to a case where the husband pays the consideration and causes the title to be vested in the wife.

—Nelson v. Nelson, 286.

Community Property.

Doctrine of Community Property Not Adopted in Minnesota. See Divorce, 7.

2. The community property doctrine as to accumulations of husband and wife does not exist in this state.

—Gummison v. Johnson, 329, 332.

Alienation of Affection.

Writ of Attachment in Action for Alienation of Affection. See Attachment.

3. The arts used and acts done by defendant in alienating the affections of plaintiff's wife are matters of evidence which need not be pleaded.

—Mullen v. Devenney, 251.

4. The charge to the jury definitely limited them to the consideration of defendant's conduct as shown by the evidence and correctly stated the ultimate facts which plaintiff must establish to make out a case.

—Mullen v. Devenney, 251.

ICE AND SNOW. See Municipal Corporation, 10, 11.

INDICTMENT. See Criminal Law, 19.

INJUNCTION.

Relief Against Breach of Contract.

1. Plaintiff was conducting a retail millinery business in defendant's dry goods department store under a contract which provided that

INJUNCTION—Continued.

plaintiff should conduct its department with the same degree of refinement and energy as the other departments in the store were conducted. Plaintiff's business was conducted ostensibly as if owned by defendant. On learning that plaintiff was to open a similar business in a competing department store, defendant gave notice that its contract with plaintiff would be terminated before its expiration. Plaintiff sued to restrain defendant from so doing and for damages. Before trial plaintiff removed because of defendant's interference. From the judgment awarding damages until the commencement of suit, and restoring possession, both parties appeal. It is held: The nature of the contract and the facts were such that if plaintiff was entitled to any relief at all it should have been limited to compensation in damages.

—Strong & Warner Co. v. H. Choate & Co. 30, 31.

2. The finding that plaintiff had failed to perform a substantial part of the contract precluded a court of equity from granting relief.

—Strong & Warner Co. v. H. Choate & Co. 31.

3. The courts may enjoin a party from breach of a contract when necessary to prevent irreparable injury. The matter rests largely in the discretion of the trial court. When an injunction necessarily requires the doing of affirmative acts of performance, the relief will be sparingly granted.

—Bennett v. Fox Film Corp. 88.

4. Contracts involving license to use film pictures of a certain name could not be arbitrarily abandoned by changing the names of the pictures, and there was no abuse of discretion in enjoining their violation by defendant.

—Bennett v. Fox Film Corp. 88, 91.

INSANITY.

Lack of Mental Capacity to Make Contract for Sale of Land. See Vendor and Purchaser, 2.

1. A contract with a person of unsound mind will not be set aside or annulled at his suit after restoration to normal condition, where it appears that it was entered into in good faith and without fraud, for a fair consideration, and without notice of the disability to the other contracting party, and no inequitable advantage has been derived therefrom. Schaps v. Lehner, 54 Minn. 208, 55 N. W. 911, followed and applied.

—Wood v. Newell, 137.

INSANITY—Continued.

2. The vendee in an executory contract for the sale of land, though he has not the fee title, may invoke the rule and thus prevent the annulment of the contract.

—Wood v. Newell, 137.

3. The evidence supports the findings of the trial court, the record presents no reversible error either in the admission or exclusion of evidence, and the findings of fact support the conclusions of law.

—Wood v. Newell, 137.

INSURANCE.**Surrender of Policy.**

1. Action on a policy of insurance. The policy never left the possession of the agent of the insurance company. The trial court submitted to the jury the question whether the policy ever became effective and also the question whether, if it did become effective, there was a consent to its surrender. The jury found for defendant. There was evidence to sustain a finding for defendant on both propositions submitted.

—Maryland v. L. R. Christenson Co. 65.

Excepted Risk. See Insurance, 2, 11.**Burglary.**

2. The goods specifically named in the coverage clause of such a policy cannot be excluded by some general prior exception therein. Rule applied to garments left with tailor for repairs.

—Olson v. Great Eastern Casualty Co. 353, 355.

3. Defendant cannot be heard to complain of the charge relating to lost fur-lined garments, since it accorded with the language of the policy construed most favorably to it.

—Olson v. Great Eastern Casualty Co. 353.

4. Under the terms of a burglary insurance policy, there was no liability "unless books and accounts are kept by the assured in such a manner that the exact amount of loss may be accurately determined therefrom by the company." The court correctly instructed that, if the books and accounts kept were such that, with the assistance of those who kept them, or understood the system, the amount of the loss could be ascertained, the condition was not violated.

—Olson v. Great Eastern Casualty Co. 353.

5. There was not sufficient proof to go to the jury of the defense that plaintiff had prevented the insurer from settling with the owners of the goods lost, nor was the question properly raised at the trial.

—Olson v. Great Eastern Casualty Co. 353.

INSURANCE—Continued.**Fidelity.**

6. The evidence required the submission to the jury of an issue as to the existence of an alleged oral contract of insurance of the fidelity of plaintiff's employes and supports the jury's finding that the parties had entered into such a contract.

—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co. 261.

7. The contents of the letter set out in the report of this case on the former appeal (142 Minn. 431, 172 N. W. 693), are not inconsistent with an inference that at some time before it was written the parties had arrived at an agreement for insurance.

—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co. 261.

Indemnity.**Refusal to Defend Action.**

8. Defendant issued its policy of indemnity insurance thereby agreeing to indemnify and protect plaintiff, within the limits therein stated, from loss on account of injuries caused to third persons from the operation of its autotruck, and, further, to defend all actions brought against plaintiff to recover for such injuries. It is held:

- (1) That the refusal of the insurance company to conduct the defense of an action so brought does not expose it to greater liability to the insured for injuries to the persons complaining than the amount stated in the policy.
- (2) The measure of liability for a breach of the contract in that respect is: 1. The amount stated as for injuries to third persons; and 2, all necessary costs and expenses incurred by the insured in defending the action.
- (3) The insurance company is not entitled to a reduction of its liability for such cost and expense in proportion as its maximum liability bears to the amount so claimed by the injured party.
- (4) The contract to defend is indivisible and extends to the whole case, regardless of the amount involved or whether it exceeds or does not exceed the liability of the insurance company.

—Mannheimer Brothers v. The Kansas Casualty & Surety Co. 482.

Payment of Attorney's Bill.

9. Counsel for defendant who was employed to defend the action following the refusal of defendant to do so, at the conclusion of the litigation presented a bill for his services which plaintiff acquiesced in and paid. There being no suggestion of fraud or col-

INSURANCE—Continued.

lusion, or basis to justify an inference of an exorbitant charge, the presentation and payment of the bill is held sufficient evidence of reasonable value to justify the allowance thereof as an item incurred in the defense of the action. The rule applied in *Mitchell v. Davies*, 51 Minn. 168, 53 N. W. 363, should not be extended to include a showing of that kind.

—*Mannheimer Brothers v. The Kansas Casualty & Surety Co.* 483.

10. The findings of the trial court that defendant repudiated its liability and refused to defend the action are sustained by the evidence.

—*Mannheimer Brothers v. The Kansas Casualty & Surety Co.* 483.

Life.

11. The policy in suit is construed as not excepting a risk resulting from the insured entering military service in time of war without the written consent of the company, but as imposing in such event a condition which the company might waive if it chose, and that evidence that the company, after notice of the death of the insured in service, wrote the beneficiary in terms consistent with the view that the policy was in force and inconsistent with a claim of present forfeiture, and, as if it intended to pay, asked her to send formal notice of death, and later asked her to send formal proofs of death, which she obtained with some trouble, justified a finding of waiver.

—*Bowman v. Surety Fund Life Insurance Co.* 118.

12. The evidence sustains the finding of the jury that the acts claimed to constitute a waiver, which were done at the home office in the name of the company, by the secretary to the medical director, in response to correspondence, were corporate acts, and were not within the provision of the policy against waiver by an agent.

—*Bowman v. Surety Fund Life Insurance Co.* 119.

Mutual Benefit.**False Answer in Application.**

13. Statements in the application for a benefit certificate in a fraternal beneficiary society were made warranties, which, if not true, annulled the certificate issued. In an action on the certificate, the defense was that in response to a question in the application, material to the risk, the insured had given an untrue answer to defendant's medical examiner who propounded the question and inserted the answer. It is held: The evidence made it a jury question whether or not the answer inserted was the answer given by the insured.

—*Gruberski v. Brotherhood of American Yeomen*, 49.

INSURANCE—Continued.

14. The fact that the certificate, containing a copy of the application and the answer mentioned, was retained for three months without objection, is not, as a matter of law, conclusive that the insured adopted the false answer as her own, the testimony being that she could not read and did not understand the English language.

—Gruberski v. Brotherhood of American Yeomen, 50.

INTERPLEADER.

1. The remedy of interpleader given by section 7764, G. S. 1913, is available to a defendant sued in the municipal court of Minneapolis.

—Metropolitan National Bank of Minneapolis v. Hennepin County Savings Bank, 367.

2. The only showing the statute requires for granting an order of substitution is that another than the plaintiff makes a claim upon defendant for the money or debt sued for, and that there is no collusion between such claimant and the defendant.

—Metropolitan National Bank of Minneapolis v. Hennepin County Savings Bank, 367.

3. It is not incumbent on defendant to show that the claim of the party asked to be substituted is valid.

—Metropolitan National Bank of Minneapolis v. Hennepin County Savings Bank, 367.

INTOXICATING LIQUOR.

1. A licensee to whom a liquor license is unlawfully issued by a city, cannot recover the license fee voluntarily paid, even though it was paid in the belief that the license might lawfully issue.

—Courtright v. The City of Detroit, 295.

2. The fact that a nisi prius court had erroneously held that the city had the right to license the sale of liquor does not give the licensee a right of recovery.

—Courtright v. The City of Detroit, 295.

Civil Damage Law.

3. A sale of intoxicating liquor by a saloon keeper to an intoxicated person is an illegal act rendering him and the surety on his bond jointly and severally liable for such damages as proximately result therefrom.

—Miles v. National Surety Co. 187, 190.

4. One entitled to maintain an action for damages so resulting does not release the surety on the bond by failing to file in the probate court a claim for such damages against the estate of a saloon keeper who dies before the action is brought.

—Miles v. National Surety Co. 187.

INTOXICATING LIQUOR—Continued.

5. Section 3200, G. S. 1913, confers a right of action for injury to his or her means of support upon each child of a person whose death is proximately caused by the illegal sale of intoxicating liquors, whether the child is a minor or an adult.

—Miles v. National Surety Co. 187, 191.

6. The evidence would justify a jury in finding that plaintiff, an adult daughter living in the home maintained by her father, was injured in her means of support by her father's death.

—Miles v. National Surety Co. 188, 191.

7. The evidence does not show conclusively that the father met his death as the result of his wanton attack upon an intoxicated man.

—Miles v. National Surety Co. 188, 191.

Modification of Judgment.

8. If the judgment against the widow and minor children of the deceased saloon keeper was not proper, it may be corrected by application to the district court.

—Miles v. National Surety Co. 188.

JUDGMENT.

1. A judgment of the probate court has the same force and effect as a judgment of the district court.

—Schmitz v. Martin, 387.

Vacating.**Vacating Default. See Divorce, 6.**

2. The trial court did not abuse its discretion in denying defendant's application to vacate a judgment and permit him to answer.

—Paper, Calmenson & Co. v. Sigelman, 199.

3. The proposed answer did not show a defense, and the motion to open the default judgment was properly denied.

—Gummison v. Johnson, 329.

4. There was no abuse of judicial discretion in opening the judgment, entered as on default during the pendency of the hearing of the order to show cause why claimant should not be substituted.

—Metropolitan National Bank of Minneapolis v. Hennepin County Savings Bank, 367.

Modification. See Intoxicating Liquor, 8.

Lump Sum Settlement under Compensation Act Confirmed by Judgment of Court and Paid by Employer, Not Open to Readjustment. See Workmen's Compensation Act, 8, 9.

JUDGMENT—Continued.**Equitable Relief for Fraud.**

5. An action may be maintained in a district court to set aside a decree of a probate court on the ground of fraud.

—Schmitz v. Martin, 386.

6. The evidence is sufficient to sustain a finding of the court that plaintiff was the wife and sole heir of Paul Schmitz, a devisee under the will of Michael Schmitz.

—Schmitz v. Martin, 386.

7. Paul died after the death of Michael. Agnes, a daughter of Michael and sister of Paul, after the death of Paul, procured from the probate court a decree assigning the share of Paul to their mother, with the result that after the mother's death it descended to Agnes. There is evidence that Agnes knew that plaintiff was the surviving wife of Paul. The decree was procured without the knowledge of plaintiff, on representation that Paul died without issue, and without revealing to the probate court the existence of plaintiff. The evidence is sufficient to sustain the decision of the court that the probate decree was procured by fraud.

—Schmitz v. Martin, 386.

Res Judicata.

Denial of Wife's Suit for Divorce for Cruelty Not Res Judicata on Issue of Cruelty in Husband's Suit. See Divorce, 2.

Foreign Judgment.

8. Action on judgment obtained in Montana action against Minnesota corporation, begun by service of process on insurance commissioner in accordance with Montana statute. Defendant had never appointed an agent in Montana to receive service. Judgment held valid under authority of Wold against this defendant, 136 Minn. 380, 162 N. W. 461. Rule of Federal cases distinguished.

—Benn v. Minnesota Commercial Mens Assn. 497.

JUDGMENT NOTWITHSTANDING VERDICT.

The evidence did not entitle appellants to judgment notwithstanding the verdict.

—Hume v. Duluth & Iron Range Railroad Co. 245.

LACHES.

Defense of Laches Does Not Depend on Time Alone. See Equity.
In Rescission of Sale of Stock. See Corporation, 1.

LANDLORD AND TENANT.

Failure of Tenant to Develop Stone Quarry Annulled Landlord's Contract to Convey. See Specific Performance, 4.

LANDLORD AND TENANT—Continued.**Agreement for Lease.**

1. The instrument, executed by the parties, evidenced a present contract of leasing, and not an agreement to make a lease in the future.

—Force v. Gottwald, 269.

Cropping Contract.

General Damages for Breach of Cropping Contract. See Damages, 2.

2. The parties made a contract under which plaintiff was to take possession of defendant's farm, paying a cash rent for the pasture and meadow land and delivering one-half of the crops harvested to defendant, the latter to furnish the seed and pay one-half of the threshing bill. Defendant refused to let plaintiff into possession, and in this action for damages it is held: As against objection first made on the trial the complaint is sufficient to allow proof of special and general damages.

—Glaubitz v. Meyer, 161.

3. The evidence did not justify the submission of special damages, there being no proof that defendant knew that plaintiff had the stock on account of which the damages were claimed, either when the contract was made or when breached.

—Glaubitz v. Meyer, 161.

4. The measure of general damages was the difference between the actual rental value at the time of the breach and the rent or compensation reserved in the contract, and the charge was misleading in suggesting that in addition profits might be added.

—Glaubitz v. Meyer, 161.

Termination.

5. It is held, on the facts stated in the opinion, that the term of the lease under which defendant was occupying the premises in question had not been terminated by the act of the parties, or otherwise, at the time plaintiff made demand for increased rent as a condition to continued possession by defendant, and that the demand to that effect was without basis for its support and of no force or effect.

—George C. Lauer Stone & Construction Co. v. Armour & Co. 359.

Breach of Covenant to Improve.

6. Ordinarily the measure of damages for a breach by the lessor of a covenant to make improvements is the difference between the rental value of the premises in their actual condition and in the condition in which the lessor agreed to put them.

—Force v. Gottwald, 268.

LANDLORD AND TENANT—Continued.

7. But where the lessor rents the premises for a business which cannot be carried on in cold weather without artificial heat, and agrees to furnish and install the apparatus necessary to provide such heat, and the business after being established and operated during the warm months is interrupted by his failure to install such apparatus, he is liable to the lessee for loss of profits if such loss was a direct consequence of his breach of the contract, and the amount thereof is not contingent or speculative, but is shown with reasonable certainty.

—*Force v. Gottwald*, 268.

8. The amount of such loss resulting from the interruption of an established business may be shown by showing the amount of profits for a reasonable period immediately preceding such interruption, if the other conditions were substantially the same.

—*Force v. Gottwald*, 268.

9. The measure of general damages for the failure of the landlord to improve or repair rented premises is diminished rental value. Special damages, if recovered, must be alleged and proved. In this case special damages were not alleged and the court properly submitted diminished rental value as the measure of damages. The verdict sustains the finding both as to the right of recovery and the amount.

—*Griebe v. Hagen*, 399.

Surrender of Premises with Cracked Boiler.

10. A lease obligated the lessee to deliver up the premises at the end of the term in as good order and condition and state of repair as they were at the time of the letting, reasonable use and wear and inevitable accident excepted. When the premises were surrendered the furnace was cracked. Proof of these facts made it incumbent on the tenant to prove that the damage was due to the excepted cause. Under the evidence in the case a finding for plaintiff is sustained.

—*Rustad v. Lampert*, 363.

Statement of Income and Expenses.

11. There is evidence that the broker submitted to the lessee an untrue statement of the income of the property and the expenses of operation, as a statement covering the preceding year. If the broker was the agent of the lessor, it is not material when or by whom the statement was prepared.

—*O'Neil v. Davidson*, 457.

LANDLORD AND TENANT—Continued.

12. There is evidence that the lessee relied on the statement as to expenses of operation.

—O'Neil v. Davidson, 457.

13. The evidence was not conclusive that the lessee waived the alleged fraud. The fact that before taking possession he discovered the untrue character of the portion of the statement relating to income does not conclusively charge him with knowledge of the facts as to the portion relating to expenses of operation.

—O'Neil v. Davidson, 457.

14. The evidence held insufficient to present an issue of fact for the jury in action for increased rent, and that a verdict was properly directed for defendant.

—George C. Lauer Stone & Construction Co. v. Armour & Co. 360.

15. There is evidence to sustain the finding of damages on the theory on which the case was submitted.

—O'Neil v. Davidson, 457.

LARCENY. See Criminal Law, 15-17.**LIBEL AND SLANDER.**

1. To render words actionable per se, in an action for slander, it is not necessary that they bear a criminal import. If, in their ordinary acceptation the words spoken would naturally and presumably be understood as importing a charge of crime, they are prima facie actionable.

—Ernster v. Eltgroth, 39.

2. Words charging an unmarried woman with incontinence are actionable per se, even when no special damages are pleaded.

—Ernster v. Eltgroth, 39.

Qualified Privilege.

3. The conversation in which the slanderous language is alleged to have been used was qualifiedly privileged, and plaintiff failed to prove actual malice.

—McKenzie v. William J. Burns International Detective Agency, Inc. 311.

4. The fact that the slanderous language was incidentally overheard by persons in an adjoining room was not such a publication as would remove it from the protection of the privilege.

—McKenzie v. William J. Burns International Detective Agency, Inc. 311.

LIMITATION OF ACTION.**Action for Malpractice.**

The complaint states a cause of action for malpractice. Such actions are not barred by the two-year statute of limitations, which applies to actions for an assault, although some of the acts alleged may constitute an assault in law.

—Burke v. Maryland, 481.

LOSS OF PROFITS. See Damages, 1; Landlord and Tenant, 7, 8.

MASTER AND SERVANT.**Proximate Cause of Injury to Minor.**

A master delivered to his servant, a minor under the age of 13 years, a shotgun, and ordered and directed him to go out and therewith shoot and scare the birds from the master's corn fields, thus to save the crop from destruction; the servant complied with the order, and while in the performance thereof the gun, in some accidental way, was discharged, seriously injuring the servant's foot. In an action by the servant for the injury it is held:

- (1) That the question of the proximate cause of the injury, if not one of law arising from the facts stated, was one of fact for the jury.
- (2) If the act of the master was the proximate cause of the injury, the fact that in accepting the gun and taking it into his possession for the purpose stated the servant technically violated the provisions of G. S. 1913, § 8804, will not defeat his right of action for the wrong of the master. Welker v. Anheuser Busch Brewing Assn. 103 Minn. 189, 114 N. W. 745, and similar cases distinguished.
- (3) The technical violation of the statute by the servant was a mere incident, and not the moving cause leading to the injury.

—Kunda v. Briarcombe Farm Co. 206.

MECHANIC'S LIEN.

1. One who furnishes material for a building at the instance of a subcontractor in the second degree is entitled to a lien therefor under the statute.

—Illinois Steel Warehouse Co. v. Hennepin Lumber Co. 157.

2. One who contracts to furnish the steel work for a building and who is required by his contract to "fabricate" a substantial part of it according to the plans and specifications for the building is a contractor as distinguished from a materialman under the mechanics' lien law.

—Illinois Steel Warehouse Co. v. Hennepin Lumber Co. 157.

3. That such contractor is a broker, not engaged in that sort of work,

MECHANIC'S LIEN—Continued.

and performs his contract through a subcontractor, does not change his relation to the building from that of a contractor to that of a materialman.

—Illinois Steel Warehouse Co. v. Hennepin Lumber Co. 157.

4. Applying the rule of application of payments on a continuous account it is held that a heating company, which bought material of the plaintiff for use and which it used in a house of the defendant, paid the plaintiff, and that the plaintiff cannot enforce a lien.

—L. J. Mueller Furnace Co. v. Burkhart, 68.

MINE AND MINERAL.**Constructive Trust.**

The defendant and two others entered into an agreement having as its object the development of a mining property on the Cuyuna range an option on which was taken in the name of the defendant. The plaintiff corporation was organized to forward the project. The defendant's two associates were the officers of the company. Stock was issued to the defendant in consideration of the transfer of the option. A certain amount was equally divided among the three promoters, and another amount was donated to the corporation to be sold for the purpose of raising working capital for development. The defendant was a practical mining engineer, was in charge of the work of development, and was active in the affairs of the company. Shortly before the option expired the defendant entered into an agreement with the plaintiff whereby he might have the option at an agreed price and make such use of it, or of a lease taken under it, as he could. He took a lease and sold it for the price which he gave for the option and in addition a specified royalty on the output. It is held, under the facts stated in the opinion, that there was a relation of confidence and trust between the defendant and the plaintiff and its stockholders, and that he could not retain for himself the advance royalty received.

—Great Northern Exploration Co. v. Mizen, 440.

MISTAKE. See Specific Performance, 3.

MONOPOLY. See Contract, 2.

The record fails to show that either in obtaining the contracts under which plaintiff did business or in its conduct thereof there was an unlawful plan to stifle competition or to fix prices or to combine to defraud or mislead the public.

—Stronge & Warner Co. v. H. Choate & Co. 31.

MORTGAGE.

1. A warranty deed containing a provision that the grantor may defeat it by paying a specified sum within a specified time is to be given the effect intended by the parties at the time it was executed.

—Citizens Bank of Morris v. Meyer, 94.

2. A deed and an agreement to reconvey on payment of a specified sum is prima facie a conditional sale, but if the purpose be to secure a debt the transaction results in a mortgage.

—Citizens Bank of Morris v. Meyer, 94.

Evidence of Intent.

3. If no debt existed and the grantor assumed no obligation to make the specified payment, this is strong evidence that the parties intended the deed to take effect as a conveyance subject to an option in the grantor to reacquire the property.

—Citizens Bank of Morris v. Meyer, 95.

4. The intention of the parties is to be ascertained from the written instrument or instruments and the attendant facts and circumstances.

—Citizens Bank of Morris v. Meyer, 94.

5. The fact that after the execution of the deed the grantor paid no taxes or incumbrances against the land, exercised no act of ownership over it, and made no claim to it, and that the grantee took possession of it, paid the taxes and incumbrances on it, and sold and conveyed it as owner is evidence that they intended the deed to operate as a conveyance.

—Citizens Bank of Morris v. Meyer, 95.

Not a Mortgage.

6. The evidence justified the trial court in finding that the instrument in controversy was a deed, not a mortgage, and vested title in the grantee subject to a right to repurchase.

—Citizens Bank of Morris v. Meyer, 95.

MUNICIPAL CORPORATION.**Power to Discharge Employes.**

1. The act creating the board of public welfare of the city of Minneapolis authorized the board to discharge the employes of former departments transferred to it without a hearing, and insofar as this act is inconsistent with the civil service act it supersedes that act.

—State ex rel. v. Board of Public Welfare of City of Minneapolis, 322.

2. The civil service act which applies to the city of Minneapolis permits the officer or board that appointed an employe to discharge

MUNICIPAL CORPORATION—Continued.

him without referring the matter to the civil service commission for a hearing unless he has been in continuous employment for six months or more.

—State ex rel. v. Board of Public Welfare of City of Minneapolis, 322.

3. Where an employe so discharged was subsequently appointed to a different position, he may be discharged therefrom by the board without a hearing before the civil service commission, unless he has served under such new appointment for six months or more.

—State ex rel. v. Board of Public Welfare of City of Minneapolis, 322.

4. The relator, being an honorably discharged soldier, was entitled to a hearing before being discharged from his position, but, as this right was not given him by the civil service act, but by the act granting preference rights to honorably discharged soldiers and sailors, that act did not designate what tribunal should hold such hearing, the duty to hold it devolved upon the board of public welfare which appointed him, and not upon the civil service commission.

—State ex rel. v. Board of Public Welfare of City of Minneapolis, 322.

5. By voluntarily appearing before the board and informing them that he had nothing further to present, the relator waived formal notice of the hearing.

—State ex rel. v. Board of Public Welfare of City of Minneapolis, 322.

6. While the return fails to show that the relator was an honorably discharged soldier, it was conceded at the argument that such was the fact.

—State ex rel. v. Board of Public Welfare of City of Minneapolis, 323.

Recovery of License Fee.

Holder of Liquor License Cannot Recover Fee Voluntarily Paid Though License Was Illegally Issued. See Intoxicating Liquor, 1.

Peace Officer.

7. A peace officer in pursuit of a law breaker is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.

—Edberg v. Johnson, 395.

Motor Vehicle Act.

8. A policeman is not chargeable with a violation of the Motor Vehicle Act solely because, while pursuing a law breaker to place him under

MUNICIPAL CORPORATION—Continued.

arrest, he operates a motorcycle in a manner prohibited by the act.

—Edberg v. Johnson, 395.

9. The words "police patrol wagons," as used in G. S. 1913, § 2619, include motorcycles, when operated by policemen in patrolling streets and highways.

—Edberg v. Johnson, 395.

Liability of Abutting Owner for Ice on Sidewalk.

10. Lot owners are not liable to pedestrians for injuries caused by stumbling or slipping on accumulations of snow and ice which form from natural causes on the adjacent sidewalk.

—Boecher v. City of St. Paul, 69.

Liability of Builder for Ice on Walk.

11. Where a builder engaged in erecting a building is authorized by the city to occupy a portion of the adjacent street and to lay a temporary walk around the obstruction, his acts done under and within the authority granted are lawful, and he is not liable to a pedestrian for injuries caused by stumbling or slipping on an accumulation of snow and ice formed by natural causes on a temporary walk constructed under such authority.

—Boecher v. City of St. Paul, 70.

NEGLIGENCE.

Of Railway Company in Failing to Keep Watchman or Gates at a Highway Crossing. See Railway, 5.

Proximate Cause of Injury to Minor. See Master and Servant.

Proximate Cause of Fire from Kerosene. See Explosive, 2.

NEW TRIAL.

Because of Accident or Surprise.

1. The court did not err in denying a new trial upon the ground of accident or surprise.

—Reynolds v. Pike-Horning Granite Co. 74.

Because of Improper Argument of Counsel.

2. The granting of a new trial for an improper statement of counsel in closing argument rests largely within the discretion of the trial court, and its action will not be reversed except for an abuse thereof. It was not abused in the denial of a new trial for the alleged misconduct of plaintiff's counsel in the particulars set out in the opinion.

—Mullen v. Devenney, 251.

Because of Misconduct of Court or Opposing Counsel. See Criminal Law, 9.

NEW TRIAL—Continued.

Because of Insufficient Evidence to Sustain Verdict. See Appeal and Error, 1.

2. The court in passing on the insufficiency of the evidence to support the second verdict was in the exercise of the same judicial discretion called for in passing on the first, with the limitation that great caution should be used in vacating a second verdict when the first was vacated on the same ground.

—Guest v. Northern Motor Car Co. 231.

4. Action to recover a share of profits on a sale of land on the theory there was a partnership agreement in reference thereto. Jury was charged that if the parties agreed that the net profits of the sale should be divided, plaintiff was entitled to recover his share of them. Verdict for plaintiff. Appeal from denial of new trial on sole ground that verdict was not justified by the evidence. Held: There was evidence enough to support the verdict and the trial court properly refused to set it aside.

—Lewis v. Lawton, 500.

Order Granting a New Trial Not Appealable Unless Order Stated It is Granted Exclusively upon Errors Occurring upon the Trial. See Appeal and Error, 2.

Effect of Reversal on Appeal of an Order Denying a New Trial. See Appeal and Error, 13.

NOTICE.

Of Claim for Loss or Damage to Interstate Shipment. See Carrier, 5, 6.
Of Dishonor of Negotiable Note Must Be Given to Indorser Within Statutory Time. See Bills and Notes, 2.

Failure to Give Indorser Notice of Dishonor Inexcusable. See Bills and Notes, 3, 4.

OPTION.

Default in Exercise of Option in Land Contract May Be Waived. See Vendor and Purchaser, 3.

PARENT AND CHILD. See Habeas Corpus, 4.

Father of Emancipated Minor Liable for His Support.

The father of a minor, whom he has emancipated, is not thereby relieved from the obligation to support an indigent child imposed by section 3067, G. S. 1913.

—Hendrickson v. Town of Queen, 80.

Custody of Child upon Divorce of Parents. See Divorce, 12.

Father of Illegitimate Minor Child Liable for Its Support. See Bastard, 2.
Consent of Mother Necessary to Adoption of Illegitimate Child. See Adoption, 2.

PARTIES TO ACTION.

Substitution of Party. See Judgment, 4.

Substitution of Agent of the President for Defendant Railroad Company. See Railway, 3.

Insurer Who Paid Loss Not Necessary Party, When.

Upon the record it is held that there was not a defect of parties plaintiff because of a failure to join an insurance company which paid a fire loss upon the plaintiff's property.

—Borsheim v. Great Northern Railway Co. 210.

PAUPER. See Parent and Child.

Father of Illegitimate Minor Child Liable for Its Support. See Bastard, 2.

Liability of Town for Nurse of Minor.

The serious illness of a minor, born out of wedlock and residing with an uncle in the defendant town, necessitated his removal to a hospital, where he was nursed by the plaintiff. She requested his alleged father to pay for her services after a stated time, but he declined. She then requested the defendant town to pay her, but it also declined. Held, that she was entitled to recover from the town, whether the minor had a legal settlement therein or not, and without reference to the question of his paternity.

—Hendrickson v. Town of Queen, 79.

PAYMENT.

On Continuous Account.

When a debtor pays generally on a continuous account, neither he nor his creditor making an application of the payment, the law applies it to the first item on the debit side.

—L. J. Mueller Furnace Co. v. Burkhart, 68.

PHOTOGRAPHER.

Violation of Sunday Observance Act. See Sunday.

PHYSICIAN AND SURGEON.

Action for Malpractice Not Within the Two-Year Statute of Limitations. See Limitation of Action.

PLAT.

Where a surveyor surveyed land, made notes of his survey, and from those notes made a plat of the land showing the acreage, and he testifies that the plat correctly shows the acreage, the plat may be received in evidence, though the surveyor's notes are not in

PLAT—Continued.

evidence. The surveyor may testify as to the number of acres in the tract, though his notes are not in evidence.

—Kies v. Warrick, 177.

PLEADING.

When a Verified Pleading in Another Action is Competent Evidence Against Party. See Evidence, 3.

Complaint. See Landlord and Tenant, 2.

1. The complaint stated a cause of action for specific performance.

—McCray v. Buttell, 487.

Answer. See Judgment, 3.

Amendment. See Appeal and Error, 14.

Judgment on Pleadings.

2. In an action upon a statutory bond, executed under the provisions of section 8667, G. S. 1913, as amended by chapter 213, Laws 1917, § 2, held, that the answers raised no issue which required proof to entitle plaintiff to judgment, and that the motion for judgment on the pleadings and record was properly granted.

—Drake v. Drake, 62.

3. The complaint alleged that the plaintiff secured a purchaser for the defendant's land at a fixed sale price and thereby earned an agreed commission of one dollar per acre. The defendant claimed that the sale price fixed was net to him and that the plaintiff was to have as his commission all in excess; that the plaintiff sent a purchaser to whom he sold at the price fixed; that the purchaser would give no more, but that he induced the purchaser to promise to pay the plaintiff a commission of one dollar per acre. On a motion for judgment on the pleadings they are to be construed favorably to the party against whom judgment is asked; and it is held that it was error to order judgment on the pleadings in favor of the plaintiff.

—Homan v. Barber, 421.

Bill of Particulars.

3. The court did not exceed its discretion in permitting plaintiffs to prove their claim for services, although they had been four days late in serving their bill of particulars, nor in refusing to permit defendant to examine plaintiffs' accounts with other clients, and its failure to give such books to the jury was not prejudicial.

—Selover v. Hedwall, 302.

POLICE POWER.

Basia of Statutory Prohibition of Certain Work on Sunday. See Sunday.

POSSESSION. See Ejectment; Landlord and Tenant, 2, 5; Mortgage, 5.

PRINCIPAL AND AGENT. See Specific Performance, 2.**Revocation of Agent's Authority. See Broker, 2.**

1. Defendant cannot take advantage of special instructions given to his agent which were not communicated to plaintiffs.

—McCray v. Buttell, 488.

Ratification of Agent's Act.

2. To ratify the act of an agent is to confirm, approve, or sanction a previous act done in behalf of the principal without authority. There can be no ratification of a contract which could not have been made binding on the ratifier at the time it was made.

—The Farmers Co-Operative Exchange Co. v. Fidelity & Deposit Co. 172.

PRINCIPAL AND SURETY.

Liability of Surety on Undertaking on Certiorari. See Workmen's Compensation Act, 12.

Liability of Surety for Sale of Liquor to Intoxicated Person. See Intoxicating Liquor, 3.

Surety Not Released by Failure to File Claim Against Estate of Saloon Keeper. See Intoxicating Liquor, 4.

Insurance of Payment of Bank Certificate.

The plaintiff bought a certificate of deposit issued by a bank at Tower on November 15, 1918. Its indorsers had recently purchased it from the payee. After the sale to the plaintiff the indorsers applied orally to the defendant for a bond guaranteeing payment, and paid the customary premium. It was issued on November 22, and was received by the plaintiff on November 30, at which time, in consideration of the bond, it released its indorsers. At the time of the oral application, it was contemplated that the Tower bank would make a formal written application, and it did so under date of December 2. The bond described the certificate of deposit, gave the name of the payee, and stated that it inured to the benefit of every subsequent holder for value. The Tower bank defaulted, and the plaintiff brought suit on the bond. Held:

- (1) The bond is construed to inure to the benefit of the plaintiff bank. Upon payment of the certificate of deposit by the bond company, the latter would have no recourse against the indorsers to the plaintiff, or against any one except the Tower bank; and the release of the indorsers by the plaintiff did not harm the defendant nor discharge the bond.
- (2) Such a bond is in the nature of an insurance contract, and is construed in favor of those whose protection is intended.

—First National Bank of Goodhue v. Iowa Bonding & Casualty Co. 279.

PROCESS.**Summons Must Conform to Statute.**

1. To acquire jurisdiction over a defendant by the service of a summons, the summons must, in substance, comply with the requirements of the statute.

—Francis v. Knerr, 122.

2. A summons which requires the defendant to serve his answer on the plaintiff at his office in a designated city in this state, when, in fact, the plaintiff is a nonresident and has no office in such city, does not comply in substance with the requirements of the statute and is a nullity.

—Francis v. Knerr, 122.

Plaintiff May Sign Summons.

3. A plaintiff who is not an attorney of this state may sign a summons in his own behalf, and the fact that his signature to it in behalf of his coplaintiff is invalid merely results in a defect of parties plaintiff, the objection to which is waived unless taken by answer or demurrer.

—Francis v. Knerr, 122.

Service of Summons on Insurance Commissioner in Foreign State. See Judgment, 8.

Service of Summons on Trade Union. See Association.

PUBLIC POLICY.

An Accepted General Business Usage is Strong Evidence of Accord with Public Policy. See Custom.

RAILROAD AND WAREHOUSE COMMISSION.

Authorized to Fix Reasonable Commissions for Buying and Selling Stock at Public Stock Yards. See Factor.

RAILWAY.**Liable for Loss of Property by Fire.**

1. The evidence sustains a finding that a fire communicated by a locomotive engine of the defendant railroad company mingled with other fires and came to the plaintiff's property and destroyed it; and that the railroad fire was a material element in its destruction and therefore the railroad or the director general was responsible for the damage done.

—Borsheim v. Great Northern Railway Co. 210.

RAILWAY—Continued.**Government Liable for Fire Loss During Federal Control.**

2. The government is liable for a loss occurring by reason of a fire communicated by a locomotive engine of a railway company during Federal control under the statute imposing upon railroads a liability for damages done by a fire so communicated.

—Borsheim v. Great Northern Railway Co. 210.

3. Following Missouri Pac. R. Co. v. Ault, 256 U. S. 554, and overruling so far as inconsistent Lavalley v. Northern Pac. Ry. Co. 143 Minn. 74, 172 N. W. 918, and other cases cited in paragraph 3 of the opinion, the former decision holding, as stated in paragraph 3, that it was not error to refuse to substitute the agent of the President for the railroad company, and to dismiss the company, is vacated; and it is held that the agent of the President should have been substituted for the railroad company and the company dismissed from the action.

—Borsheim v. Great Northern Railway Co. 210.

Accident at Crossing.

4. In an action for injury to an automobile truck in a collision with defendant's train, evidence showing the character of the crossing and the extent of the traffic thereon is admissible on the question of negligence.

—MacLeod v. Payne, 495.

5. The evidence stated in the opinion was not sufficient to warrant the submission to the jury of a charge of negligence on the part of a railroad company based on its failure to maintain a watchman, gates, automatic bells or other signals at a highway crossing to warn travelers of the approach of trains. There is no hard and fast rule for determining whether there should be a submission of such a charge of negligence. The facts and circumstances of each case must be the guide to the trial courts in deciding upon the course to be followed.

—Hume v. Duluth & Iron Range Railroad Co. 245.

6. Under the proofs it was error to submit to the jury the question of negligence of appellant in failing to provide a flagman, gates or a bell at the crossing.

—Engel v. Minneapolis Street Railway Co. 356.

7. In submitting to the jury the question whether the absence of a flagman, gates or a gong at a particular grade crossing, constituted negligence on defendant's part, in the absence of any express provision requiring either of them, it is not prejudicial to defendant for the court to state the absence of express law on the subject.

—MacLeod v. Payne, 494.

RAILWAY—Continued.

8. At a railway crossing the earth between the two tracks, ten feet apart, sagged down a few inches. The planks at the side of each rail, six inches wide and three inches thick, stood above the road-bed about two inches. A Ford automobile, in which decedent was riding, would receive severe bumps passing over the crossing at the rate of ten or twelve miles an hour. Held: Testimony of a witness accustomed to driving a Ford car over this crossing, bearing upon the proper method of operating such car over that crossing, and received over objections, was not prejudicial to the rights of defendant and was not reversible error.

—Pratschner v. Electric Short Line Railway Co. 425.

9. Evidence that the driver of an automobile truck, who was approaching a crossing with which he was familiar, failed to stop when he saw a car approaching rapidly, but shifted his gears to low, held to show contributory negligence on his part, as a matter of law.

—Engel v. Minneapolis Street Railway Co. 358.

RAPE. See Criminal Law, 18-23.

RECEIVER.**Final Account.**

Questions concerning the allowance of a receiver's final account and fixing his fees and those of his attorney, rest largely in the discretion of the trial court. Held: That discretion was not abused.

—Northland Pine Co. v. Northern Insulating Co. 499.

REGISTRATION OF TITLE. See Executor and Administrator, 2.

RELIGIOUS SOCIETY.

1. Members who secede from a religious society forfeit their rights in the church property.

—Lost River Norwegian Evangelical Lutheran Congregation v. Thoen, 380.

Division of Property.

2. The court has power to make an equitable division of the property of a religious society, when its members separate by mutual consent, owing to an honest difference of opinion, and both parties still adhere to the faith or doctrines of the church, and agree upon and attempt to make a division of the property, which is invalid for want of the notice required by section 6598, G. S. 1913.

—Lost River Norwegian Evangelical Lutheran Congregation v. Thoen, 379.

3. In case the members separate because of honest differences of opinion, but both parties still adhere to the doctrines of the church,

RELIGIOUS SOCIETY—Continued.

the court may divide the property between them in proportion to their numbers at the time of the separation.

—Lost River Norwegian Evangelical Lutheran Congregation v. Thoen, 380.

4. A division on that basis was proper, though not asked for by either party, when the aid of the court was sought to set aside deeds of the property which were executed to accomplish the division which had been agreed upon.

—Lost River Norwegian Evangelical Lutheran Congregation v. Thoen, 380.

SALE.**Meaning of Words, Invoice Price.**

A written memorandum of contract for the sale of a stock of merchandise, construed in connection with the oral negotiations between the parties leading up to the sale and their acts and conduct in completing the transaction after the memorandum was prepared and signed, held to make the retail or inventory price of the goods, and not the wholesale or invoice price, the basis for the computation of the purchase price.

—Sell v. Lenz, 200.

False Representation of Seller of Ice Machine. See **Fraud**, 1.

Breach of Verbal Contract. See **Frauds (Statute of)**, 1.

SCHOOL AND SCHOOL DISTRICT.**Enlargement of District.**

1. On an appeal from the order of the county board refusing to enlarge a school district, the order being legislative in character and not subject to reversal unless arbitrary and without due regard to the public interests, the evidence sustains a finding of the jury, approved by the trial court, that the act of the county board was arbitrary and without due regard to public interests.

—Sartell v. County of Benton, 233.

Right of Appeal from County Board Statutory.

2. The right of appeal from orders of county boards, changing the boundaries of school districts, is statutory. There is no right of appeal, unless given by statute. The statutes of this state do not give a right of appeal from an order made on a rehearing of a petition for change of boundaries of a school district under G. S. 1913, § 2703.

—In re Consolidated School District No. 41, Crow Wing County, 418.

SET-OFF AND COUNTERCLAIM.

Defendant Waives Objection to Jurisdiction of Court by Presenting Counterclaim. See Court, 1.

An action in ejectment, brought by an administrator, set up a deed to his intestate as source of his title and right to possession. Defendant met this proof by showing that the deed was void. This was in no sense proving a counterclaim.

—Crane v. Veley, 86.

SOLDIERS AND SAILORS CIVIL RELIEF ACT. See Army and Navy.**SPECIFIC PERFORMANCE. See Pleading, 1.****Enforcing Partial Performance.**

1. Where a tract of land sold is described in the contract of sale as of a given quantity, and the quantity is in fact deficient, the purchaser may at his option have specific performance with pecuniary compensation or abatement of the price proportioned to the amount of the deficiency.

—Kies v. Warrick, 177, 179.

Part Owner Required to Convey His Interest.

2. Where the vendor, for himself and as agent for the other part owners, contracts to convey the entire property, but in fact lacked authority to execute the contract on behalf of the other part owners, the vendee may require him to perform the contract to the extent of conveying his own interest in the property on receiving a proportionate part of the purchase price, unless it be shown that the lack of authority in the vendor was known to the vendee when he executed the contract.

—McCray v. Buttell, 487.

Mistake.

3. In an action for specific performance, the fact that a provision favorable to the defendant has been omitted from the contract by mistake is not a defense if the plaintiff is ready, able and willing to perform the whole agreement, including the omitted term.

—Kies v. Warrick, 177.

Construction of Contract.

4. The defendant leased to the plaintiff for 10 years a large tract of land in which there was a partially developed stone quarry, and agreed to convey to him one-half of the land at the expiration of the lease, it being then in force. The plaintiff did not agree to develop a quarry and expressly exempted himself from liability for a failure to do so. The parties contemplated, as a vital part of the consideration for a grant of one-half the lands, that the plaintiff

SPECIFIC PERFORMANCE—Continued.

would develop or make a genuine effort to develop a quarry, and such development or effort to develop was an implied condition of the agreement to convey. There was no such development or effort to develop and the court rightly denied specific performance.

—Reynolds v. Pike-Horning Granite Co. 73.

Tender.

5. Plaintiff was not required to tender performance before suit for specific performance.

—Kies v. Warrick, 177.

STATE.

The act of February 13, 1911, 36 St. 901, Federal Appeals Act, has no application to procedure in a state court.

—Chance v. Hawkinson, 92.

STATE FIRE MARSHAL.

Condemnation of Building. See Health, 1-3.

STATE SECURITIES COMMISSION. See Bank and Banking.**STATUTE. See Corporation, 2.****Construction to Avoid Absurdity.**

The intent of the legislature determines the interpretation of a statute, though it seems contrary to the letter of the statute. A construction should be avoided which would result in inconvenience or absurdity.

—Edberg v. Johnson, 395, 397.

Practical Interpretation of Inheritance Tax Law by State Officials. See Taxation, 4.

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TAXATION.

Interstate Shipment of Wood Pulp Not Taxable.

1. Pulpwood was loaded and shipped by rail from the northern forests of Minnesota during the winter season to ports within the state on the shore of Lake Superior, where it was stored in the rail carrier's yards until navigation over the lakes opened in the spring, then shipped to its final destination, which was Erie, Penna., as shown by the shipping bill. Held, that the first movement was a part of an interstate journey, that the delay at the ports did not destroy the interstate feature, and that the property did not acquire a situs at the ports for the purpose of taxation.

—State v. Hammermill Paper Co. 414.

Assessment of Real Property.

2. The land involved in this proceeding, though within the boundaries of the city of St. Paul, but in the outskirts thereof and unplatted, held assessable for taxation under G. S. 1913, § 1988, at 33½ per cent of its true value. State v. Minn. Tax Commission, 135 Minn. 205, 160 N. W. 498, limited.

—In re Delinquent Real Estate Taxes, 335.

3. In deciding whether property situated in the outskirts of a city is taxable as unplatted suburban land at 33½ per cent of its value, or as platted urban property at 40 per cent, its value should not be given any special significance or effect.

—In re Delinquent Real Estate Taxes, 337.

Inheritance Tax.

4. The practical interpretation given the inheritance tax law by the state officials concerned in its enforcement during a long period of time, should be given weight by this court when the question of the proper construction of such law is presented. In view of the

TAXATION—Continued.

rule stated, it is held, that upon all property, passing to the heir or legatee, in excess of the clear value of \$15,000, the secondary rate applies; the primary rate applying only to what remains of the first \$15,000 after deducting the exemption.

—In re Boutin's Estate, 148.

5. Where testator devised all his property to his wife for life, remainder to their daughter, the title vests on the death of the testator, and the probate court in the first instance correctly determined the value of the legacy to each of the legatees for the purpose of inheritance taxation, under section 2272, G. S. 1913, as amended by chapter 410, Laws of 1919.

—In re Estate of E. D. Meldrum, 342.

TELEGRAPH AND TELEPHONE.

When Conversation Over a Telephone Is Admissible in Evidence. See Evidence, 2.

TENDER.

Of Performance before Suit for Specific Performance. See Specific Performance, 5.

TOWN.

Right to Material in Bridges. See Highway, 1, 2.

TRADE UNION. See Association.**STREET RAILWAY.**

Injury to Passenger Who Stumbles Over a Sample Case of Another Passenger. See Carrier, 7.

SUNDAY.

The Sabbath day observance statute prohibits work on the Sabbath which interferes with the repose and religious liberty of the community and is not work of necessity or charity; and it prohibits certain work, though it does not disturb the community, upon the ground that a periodic cessation from usual labor makes for the physical and intellectual and moral welfare of mankind. The basis of the latter prohibition is in the police power of the state exercised for the general good. Applying the statute, it is held that the business of a photographer is work within its meaning; that conditions are such that competition substantially induces all studios to be open if some are; that a numerous body are affected if studios are kept open, and thereby deprived of a day of rest or recreation or religious observance; that the prohibition of the statute applies to photographers taking pictures on Sunday, and is a

SUNDAY—Continued.

legitimate exercise of the police power, and the conviction of the defendant is sustained though his work was not so conducted as to interfere with the repose and religious liberty of the community.

—State v. Dean, 410.

TRIAL.

Consolidation of Cases. See Appeal and Error, 6.

Misconduct of Prosecutor. See Criminal Law, 8.

Question for Jury. See Bills and Notes, 6; Broker, 8; Insurance, 1, 6, 13.

Accused Cannot Make Closing Argument. See Criminal Law, 5.

Directed Verdict. See Corporation, 9; Landlord and Tenant, 14.

Charge to Jury. See Appeal and Error, 12; Railway, 7.

To Convict of Crime Charged or to Acquit, When Degree of Crime Is Not in Doubt. See Criminal Law, 6.

1. If arts used in alienating affection are pleaded and some are not proved, the court is not required to instruct the jury that there is no evidence that defendant was guilty of those not proved, even though plaintiff's counsel read the complaint to the jury in making his opening statement. *Bowers v. C. M. & St. P. Ry. Co.* 141 Minn. 385, 170 N. W. 226, distinguished.

—Mullen v. Devenney, 251.

2. There was no error in refusing to give plaintiff's requests to the jury separately, and in including in the general charge all the points covered by them.

—MacLeod v. Payne, 493.

Argumentative Charge.

3. The charge of the trial court considered, and held, that it was not argumentative, as contended for by appellant, but it submitted the issues clearly and fairly to the jury.

—Wetmore v. Hudson, 332.

Undue Prominence to Letter.

4. The trial court did not give undue prominence in its instructions to the jury to the letter to which reference has been made.

—Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co. 262.

Refusal to Give Requests to Jury.

5. There was no error in the refusal to give certain requested instructions. Error cannot be predicated upon the omission to instruct on an issue not presented on the trial.

—Gruberski v. Brotherhood of American Yeomen, 50.

TRIAL—Continued.**Refusal to Instruct.**

6. There was no error in the court's refusal to give the instructions requested by defendant.

—Mullen v. Devenney, 251.

Objection to Improper Argument of Counsel.

7. If counsel for one of the parties makes an improper statement in his closing argument to the jury, prompt objection should be made in order that there may be an opportunity to correct its prejudicial effect by appropriate action at the time.

—Mullen v. Devenney, 251.

Effect of Charge as a Whole.

8. Assignments of error as to isolated parts of the charge not well taken, the general charge being such as to fully and fairly submit all the issues to the jury.

—Pratschner v. Electric Short Line Railway Co. 425.

Findings of Court. See Appeal and Error, 9.**Statement in Judge's Memorandum Not Equivalent to Specific Finding of Fact. See Workmen's Compensation Act, 4.**

9. Findings in divorce case stated evidence was not sufficient to prove cruel treatment within the intent "of the approved rules of this jurisdiction." "Jurisdiction" construed by appellate court to mean the state of Minnesota, and not the judicial district where the case was tried.

—Eberhart v. Eberhart, 193.

Finding Controlled by Specific Facts Found.

10. A finding, in form one of fact but in reality in the nature of a conclusion from specific facts set forth in the preceding findings, is controlled by such specific facts.

—Pushor v. American Railway Express Co. 308.

TROVER AND CONVERSION. See Gift.**TRUST.****No Trust Where Husband Pays Consideration and Causes Title to Be Vested in the Wife. See Husband and Wife, 1.**

1. Plaintiff was the lawful wife and sole heir of George J. Speiss when he died, the record owner of the real estate involved in the action. Before his death he had conveyed direct to defendant an undivided one-half thereof by deeds which she recorded after such death. Subsequent to his marriage to plaintiff, he entered a bigamous marriage with defendant, and continuously thereafter cohabited with her. The whole of the real estate mentioned, consisting of his

TRUST—Continued.

homestead in the city and an 80-acre farm, is claimed by each party to the suit. It is held:

- (1) By virtue of section 6706, G. S. 1913, the absolute title vested in George J. Speiss when the real estate was conveyed to him, even though the purchase price was paid by defendant.
- (2) She cannot have a constructive trust or a trust ex maleficio declared, for the findings, amply sustained, are that she knew of and acquiesced in the title being taken in the name of George J. Speiss, and that she knew from the start that her relations with Speiss were bigamous.
- (3) The burden was on defendant to prove that her money paid for the real estate involved. She did not sustain this burden.

—Speiss v. Speiss, 314.

2. Where the husband's earnings pay for land, but the title is taken in the wife's name, she becomes the absolute owner under section 6706, G. S. 1913; and no resulting trust or trust ex maleficio can be declared under section 6708, G. S. 1913, when it appears that the title was so taken with his knowledge and acquiescence and the only fraud charged against her was misrepresentations as to the law bearing upon the property rights of husband and wife.

—Gummison v. Johnson, 329.

Constructive Trust.

Mining Engineer Who Was Stockholder in a Corporation for Developing a Mine Not Entitled to Retain Royalties Payable to Him. See Mine and Mineral.

VENDOR AND PURCHASER.**Mental Capacity to Contract.**

1. The evidence fails to sustain the finding that defendant fraudulently misrepresented the value of the land, or the finding that plaintiff lacked mental capacity to make the contract in controversy.

—Rogers v. Central Land & Investment Co. 347.

Contract of Sale Reinstated.

2. The vendee made a default which, by the terms of the contract, authorized the vendor to declare the deferred instalments due immediately and to cancel the contract. After declaring the deferred instalments due immediately, the vendor instituted the statutory proceeding to cancel the contract. The vendee complied with the conditions in which he had made default within the statutory time, but did not pay the deferred instalments. Held, that the payment of the deferred instalments could not be required in the statutory

VENDOR AND PURCHASER—Continued.

proceeding, and that the removal of the default which authorized its cancelation reinstated the contract.

—Needles v. Keys, 477.

Exercise of Option.

3. A provision in an option contract for the sale of land, requiring the option to be exercised within a specified time, may be waived. Waiver does not necessarily rest on contract. If, after default in performance of a contract within the time stipulated, the party entitled to take advantage of the default, with knowledge of the facts, treats the contract as still in force, or deals with the other party in a manner consistent only with a purpose on his part to regard the contract as still subsisting and not terminated by the default, he waives the default.

—Malmquist v. Peterson, 223.

Remedy of Vendee When Land Sold Is Deficient in Quantity. See Specific Performance, 1.

Rescission of Contract Made in Name of Agent. Recovery for Fraud Against Owner and Agent. See Broker, 9.

WAR.

1. By the Food Control Act (40 St. 276, 41 St. 297), Congress, acting under the war power of the Constitution, authorized the taking control and regulation of the business of public stock-yards, including the business of commission men buying and selling live stock there.

—State v. Rogers & Rogers, 151.

2. Under such authority the government assumed control of the public stock-yards at South St. Paul and of the business of commission men doing business there; and during such control the state could not interfere by fixing and enforcing commission charges through the delegated authority of the Railroad and Warehouse Commission pursuant to Laws 1919, Ex. Sess. c. 39.

—State v. Rogers & Rogers, 151.

WILL.**Attestation.**

1. It is not necessary under our statutes that witnesses to a will sign as such in the presence of each other, though each must sign at the instance, express or implied, of the testator, and in his conscious presence.

—Gates v. Gates, 391, 393, 394.

2. The evidence made the question whether there was a legal and sufficient attestation of the will here involved one of fact, and the

WILL—Continued.

findings of the court thereon are sufficiently supported by competent proof.

—Gates v. Gates, 392, 394.

Construction.

3. Devise by testator to his wife of all his property for life, with power to sell and convey as she may think best, without accounting to the court for the proceeds, remainder to their daughter, does not convey a fee to the life tenant, but only the naked power to dispose of the fee.

—In re Estate of E. D. Meldrum, 342.

4. A will in this action is construed and held to authorize payment of a legacy only out of any residue remaining after providing for certain specific gifts and annuities.

—Liedel v. Holman, 276.

Demonstrative Legacy.

5. A demonstrative legacy is a money gift, made a charge on a specific fund, but payable at all events if the fund falls. The legacy in question is not a demonstrative legacy.

—Liedel v. Holman, 276.

WITNESS.**Cross-Examination.**

1. Defendants were not unduly restricted in their cross-examination of the state's principal witness.

—State v. Townley, 6.

Reason for Change of Sentiment in Witness.

2. The reasons for a change from friendly to unfriendly sentiments on the part of a witness for the state having been inquired into on his cross-examination, it was not error to permit the state to further develop the subject within reasonable limits.

—State v. Townley, 6.

Impeachment.

3. An affidavit by plaintiff offered by defendant to impeach her testimony should have been received. Proper foundation for its reception was furnished by a witness who testified that he correctly read it to her before she signed it.

—Rittle v. St. Paul City Railway Co. 216.

WORDS AND PHRASES.

Courts will understand and construe words charging an unmarried woman with incontinence as ordinary men naturally understand such words.

—Ernster v. Eltgroth, 40.

WORDS AND PHRASES—Continued.

In Action for Slander Words Need Not Bear a Criminal Import to Be Actionable Per Se. See Libel and Slander, 1.

Meaning of "Invoice Price" in Contract of Sale. See Sale.

"Police Patrol Wagons" in G. S. 1913, § 2619, Include Motor Cycles. See Municipal Corporation, 9.

"Rules of This Jurisdiction" in Findings in Divorce Case, Construed. See Trial, 9.

WORKMEN'S COMPENSATION ACT.

Includes Servant of Interstate Express Company.

1. A minor was accidentally killed while in the employ of an interstate common carrier by express. Held, that there was liability under the Workmen's Compensation Act, notwithstanding that fact.

—Pushor v. American Railway Express Co. 308.

Injury Inflicted in Quarrel Over Work.

2. An employe injured during the course of his employment, though by the wilful act of a coemploye, is within the compensation act, if there is some causal relation between the employment and the injury, that is, if the injury be one which may be seen to have had its origin in the nature of the employment. An injury inflicted by a coemploye as a result of a quarrel over the manner of doing their work is within the rule.

—Hinchuk v. Swift & Co. 1.

Accident Not Arising from Employment.

3. A teamster who, in a fit of anger, beats one of the horses he is employed to care for and drive, his anger being provoked by a cause wholly foreign to the employment, is not entitled to compensation under the Workmen's Compensation Act, if injured by a kick from the horse when he is so beating it.

—Harris v. Kaul, 428.

4. Neither the evidence nor the findings show that, when he was kicked, the workman was in the act of cleaning the horse. A statement that he was, found only in the trial judge's memorandum, is not the equivalent of a specific finding that such was the fact.

—Harris v. Kaul, 428, 430.

Partial Dependents.

5. Following the construction of subdivision 3, § 8208, G. S. 1913, adopted in Fleckenstein Brg. Co. v. District Court, 134 Minn. 324, 159 N. W. 755, it is held that the parents of a minor son, living with them regularly and giving his wages to his mother, to be used in paying the household expenses, are his partial dependents, even though the father's earnings would have been sufficient to maintain the family,

WORKMENS' COMPENSATION ACT—Continued.

if they had not been expended in the purchase of the house which it occupied.

—Pushor v. American Railway Express Co. 308.

Employer May Obtain Award Against Wrongdoer.

6. Under G. S. 1913, § 8229(1), an employer against whom an award of periodical payments is made under the compensation act in favor of an employe or dependent, where the injury or death was caused by the negligence of a third party, all being under the compensation act, may have an award against the third party like that which the employe or dependent might have had, and need not await the payment of the entire amount due on the award against him before having his rights against the third party fixed and determined.

—Metropolitan Milk Co. v. Minneapolis Street Railway Co. 181.

Wife Presumed Dependent on Husband, When.

7. Under our statute a wife is conclusively presumed to be wholly dependent upon her husband unless voluntarily living apart from him. The trial court found that plaintiff was so dependent. Applying the rule stated in State v. District Court, 142 Minn. 335, 172 N. W. 133, it is held that the finding is sustained.

—Hinchuk v. Swift & Co. 1.

Lump Sum Settlement Final.

8. A lump sum settlement in proceedings under the Workmen's Compensation Act, entered into by the parties under the provisions of G. S. 1913, §§ 8216 and 8222, approved by the trial court and formally confirmed by its judgment, and paid by the employer, in the absence of fraud or deception is final, and not open to readjustment.

—Integrity Mutual Casualty Co. v. Nelson, 337.

9. It was within the power of the legislature to declare such settlements final, and, when not challenged for fraud, the courts are without authority, inherent or otherwise, to nullify the legislative declaration to that effect.

—Integrity Mutual Casualty Co. v. Nelson, 338.

10. The mistakes and amendment statute, G. S. 1913, § 7786, is inapplicable. State v. District Court of Rice County, 134 Minn. 189, 158 N. W. 825, is distinguishable in that it did not involve a lump sum settlement.

—Integrity Mutual Casualty Co. v. Nelson, 338.

Undertaking on Certiorari to Review Judgment.

11. In proceedings under the Workmen's Compensation Act an injured workman recovered a judgment against the insurer of his employer. A writ of certiorari was issued to review the judgment, and

WORKMENS' COMPENSATION ACT—Continued.

to obtain the writ defendant executed an undertaking conditioned as a supersedeas bond under section 8004, G. S. 1913. Held, that the undertaking obligated the surety for defendant to pay the judgment, and not merely the costs and damages.

—Carlson v. American Fidelity Co. 114.

12. The fact that by the execution of an undertaking so conditioned the plaintiff gained an advantage to which he may not have been entitled does not relieve the surety from the liability expressed in the undertaking. The undertaking may be enforced as a common law obligation, although its conditions are more onerous than would have been required if a statutory bond had been given to effect the same purpose.

—Carlson v. American Fidelity Co. 114.

13. The judgment was payable in weekly instalments, and such instalments were paid until and after the judgment was affirmed and the case remanded to the district court. Held, that the surety on the undertaking nevertheless remained liable for the payment of the remainder of the judgment.

—Carlson v. American Fidelity Co. 115.

WRIT. See Attachment; Certiorari; Habeas Corpus; Workmen's Compensation Act, 11, 12.

[End of Volume]

*Gr. C. H.
N/29/22*

